for £50 damages as a result of an alleged abduction of plaintiff's daughter by the defendant.

The Native Commissioner dismissed the claim and plaintiff has now appealed to this Court on the grounds that the judgment was against the weight of evidence and is bad in law.

This Court need only concern itself with the fact whether or not on the evidence a claim lies for damages for abduction.

The facts are that negotiations for a marriage took place and defendant actually paid to plaintiff an Ngqutu beast, £5 Mvimba beast, £14 Izibizo, £3 Bikibiki, £5 Mgezemuzi, apart from the presents to the mother consisting of 100 lbs. sugar, washing basin, a big knife, 2 cups and saucers, 1 gallon paraffin, fork and teapot. The girl actually visited the defendant. There is a dispute as to the periods of the various visits but this is immaterial as it is clear from the Assistant Native Commissioner's reasons for judgment that he accepted the defendant's version, and properly so on the evidence, that plaintiff's daughter visited him twice only, the first time with plaintiff's consent and the second time without it, so that the matter at issue is the final visit to defendant.

According to defendant's evidence that visit took place in the following circumstances:—

> During the subsistence of the daughter's betrothal to defendant she advised the latter that her father was forcing her to marry another man. Defendant met her and her brothers on the way to the kraal of a certain Buso Shangase and intervened after she told him that she was being taken to that kraal against her will for the purpose of marriage. There was a struggle between defendant and the brothers and thereafter she followed him to his kraal. In these circumstances it is clear that there was no intention by defendant to abduct plaintiff's daughter as his keeping her at his kraal was prompted by her telling him that plaintiff was trying to force her into a marriage with another man while she was still betrothed to him (defendant) and his action therefore amounted to no more than giving her sanctuary and cannot be regarded as abduction.

The appeal is accordingly dismissed with costs.
For Appellant: Mr. R. I. Arenstein of Durban.
For Respondent: In person.

CASE No. 41 OF 1951.

SIMON ZWANE (Appellant) *v.* **EDWIN NGIDI (Respondent).**

N.A.C. CASE No. 54/1951.

DURBAN: Tuesday, 24th July, 1951. Before Steenkamp, President. Balk and Leibrandt, Members of the Court (North-Eastern Division).

Practice, Procedure and Evidence—Documents not in either of official languages—Not to be admitted in evidence unless accompanied by translations in one of the official languages.
Appeal from the Court of the Native Commissioner, Durban. Steenkamp (President):—

There was handed in as an exhibit a letter written in the native language. No translation accompanied the exhibit and I wish to point out that in no circumstances should presiding officers admit any document not in either of the official languages unless a translation is attached.

For Appellant: Mr. Adv. A. Lansdown, instructed by Goldberg & Co., of Durban.

For Respondent: Mr. A. D. G. Clarke of Clarke & Robbins, Durban.

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

MERENSKY BIBLIOTEEK
16 AUG 1952
UNIVERSITEIT VAN PRETORIA
Klasnommer 34(68)
Registernommer SDN 1/14

(North-Eastern Division)

1951

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G.P.-S.9978—1951-2—500.

OFFICERS OF THE NATIVE APPEAL COURT (NORTH-EASTERN).

PRESIDENT.

The Honourable J. H. Steenkamp, as from 27th October, 1946.

PERMANENT MEMBER.

Mr. M. Israel, as from 1st November, 1950, to 16th May, 1951.
Mr. H. Balk, as from 1st June, 1951.

REGISTRAR.

Mr. D. C. de Lange, as from 1st April, 1947, to 28th February, 1951.
Mr. P. J. L. Botha, as from 1st March, 1951, to 30th September, 1951.
Mr. R. Welman, from 1st October, 1951.

CASE No. 42 OF 1951.

J. SIBANDA (Appellant) *v.* **JAMES SITOLE (Respondent).**
N.A.C. CASE No. 59/51.

PRETORIA: Monday, 10th September, 1951. Before Steenkamp, President, Balk and Smithers, Members of the Court (North-eastern Division).

Practice and Procedure—System of law to be applied—Discretion to be exercised judicially—Alternative value of "isondhlo" cattle to be determined from evidence.

Held: That the Native Commissioner misdirected himself in applying Common Law in the present case in which both systems of law provide a remedy, solely on the ground that Common Law should be primarily applied and Native Law only invoked in matters peculiar thereto falling outside the principles of Common Law.

Held: That if it is clear that the parties contemplated Native Law, that law should be applied, otherwise Common Law obtains.

Balk (Permanent Member), delivering the judgment of the Court:—

Plaintiff (present respondent) sued defendant (present appellant) in the Native Commissioner's Court for re-imbursement of the expenses incurred by him (plaintiff) in maintaining defendant's three minor children.

In the particulars of claim embodied in his summons, plaintiff averred that—

"(1) The defendant was formerly married to one Elizabeth Sitole, a sister of the plaintiff, by Native Custom.
(2) During 1940, and at Pretoria, the said Elizabeth Sitole died.
(3) The said Elizabeth Sitole left three children being Mafanate, Boy and Tali of whom the defendant is the father, and which said children are all minors.
(4) During 1948, and at Pretoria certain dispute arose between plaintiff and defendant as a result whereof, the above Honourable Court awarded the custody of the said children to the said defendant.
(5) The said defendant has not called for the children, nor has he maintained them, and the said children are at present being maintained by the said plaintiff, and have been maintained by the said plaintiff from June, 1938.

(6) The cost of maintaining the said children amounted to the sum of £4. 0. 0. per month from the 1st June, 1938, till June, 1947, being a total amount of £422. 0. 0.
(7) The cost of maintaining the said children from June, 1947, amounts to £2. 0. 0. per month;"

and prayed for the following judgment against defendant:—

"(*a*) For payment of the sum of £422. 0. 0.
(*b*) Payment of the sum of £2. 0. 0. per month from 1st June, 1947, to date of defendant taking over and maintaining the said children.
(*c*) Costs of suit.
(*d*) Alternative relief."

Defendant pleaded as follows:—

"(1) Defendant admits paragraphs (1), (2), (3) and (4) of plaintiff's summons (i.e. particulars of claim).
(2) The defendant denies each and every allegation contained in paragraph (5) of plaintiff's summons as if specifically traversed and puts plaintiff to the proof thereof.
(3) Save and except that defendant states that the costs of maintaining the children does not exceed £2. 0. 0. (two pounds) per month, defendant denies each and every allegation contained in paragraph (6) of plaintiff's summons.
(4) Defendant admits that the cost of maintaining the children amounts to £2. 0. 0. (two pounds) per month but denies that the plaintiff had maintained the children at any time whatsoever.
Wherefore defendant prays that plaintiff's summons may be dismissed with costs."

At the commencement of the hearing of the case, plaintiff's attorney intimated that he was bringing the action under Common Law "as Native Law remedy is too low in value" and he accepted paragraph 4 of the plea in so far as the cost of the maintenance of the children was concerned.

Defendant's attorney submitted that the "case must be tried by Native Custom where such provides a remedy".

During the hearing of the action defendant's attorney applied for and was granted leave to amend his client's plea by adding thereto that if it was held that Common Law applied, defendant pleaded as an alternative that the cause of action up to the end of the year 1947 had been prescribed.

Judgment was entered for plaintiff for maintenance at the rate of £2 a month for the period 1st August, 1940, to 31st July, 1948, i.e. 96 months at £2 per month, making a total of £192, with costs.

Against this judgment defendant noted an appeal on the following grounds:—

"(1) That the Presiding Officer erred in applying the principles of Roman-Dutch Law in the matter between the parties.
(2) That if Roman-Dutch Law applies then the Presiding Officer erred in not applying the plea of prescription which was at the time of hearing asked to be incorporated in the pleadings.
(3) That the Presiding Officer erred in accepting the evidence of plaintiff (now respondent) and his mother, and rejecting the evidence of defendant (now appellant)."

Plaintiff noted a cross-appeal against the Court's refusal to entertain his claim for the maintenance of the minor children concerned from August, 1948, at £2 per month, on the ground that it had erred in so doing as that decision was against the weight of evidence.

In his reasons for judgment the Native Commissioner, in so far as these reasons concern the first ground of appeal, states:—

"In regard to whether Native or Common Law should be applied, the case of Nqanoyi *v.* M. Njombeni, 1930, N.A.C. (C. & O.), ruled that the discretion (to apply Native or Common Law) given to a Native Commissioner by section *eleven* of the Native Administration Act is not absolute and that a true construction of the section is that Roman-Dutch Law must be primarily applied and Native Law invoked only in matters peculiar to Native Custom falling outside the principles of Roman-Dutch Law.

In the present case the maintenance of minor children by a person not legally liable to maintain them is not a matter peculiar to Native Custom and it is accordingly held that the action must be decided according to the tenets of Common Law."

The ruling referred to above in Nqanoyi's case was not endorsed in Moima v. Matladi, 1937, N.A.C. (T. & N.), 40, wherein the learned President, delivering the judgment of the Court, stated:—

"Proceeding to interpret section *eleven* of Act No. 38 of 1927, in the light of the foregoing remarks, we must formulate the proposition as follows:—

The Native Commissioner is empowered to apply two systems of law:—

1. In some cases which come before a Native Commissioner for decision the cause of action is one known to both systems of law, Roman-Dutch and Native.
2. In some cases the cause of action is known only to Roman-Dutch Law, or only to Native Law.
3. In regard to 2, the Native Commissioner is required by the decision in Charles Muguboyo *v.* William Mutato [1929, N.A.C (T. & N.), p. 73] to apply that system of law which provides a remedy.
4. In regard to 1, a discretion is vested in the Native Commissioner by section *eleven.*

Now, a discretion implies a choice of action. It is to be exercised judicially and not capriciously, but it can be exercised. [Jacob Ntsabele *v.* Jeremiah Poolo, 1930, N.A.C. (T. & N.), 13.]

Now, what is the choice given the Native Commissioner? Is it a discretion whether or not to apply Native Law; or is it a choice between one or other system of law, either of which affords a remedy?

To this Court it is inconceivable that the legislature intended the choice to be the first, viz., whether to apply Native Law or to reject it and refuse to hear the case. As indicated in the foregoing comments on policy, this clearly was not the intention of the legislature.

The discretion then can be only in regard to the system of law to be applied.

If, then, the Native Commissioner is given a discretion and he exercises that discretion judicially, this Court is not entitled to deprive him of that discretion by directing that he must apply Common Law to the exclusion of Native Law. If anything, the rule announced by Holland would give preference to Native Law as indeed Natal practice has established.

For these reasons this Court cannot endorse the decision of the Cape and Orange Free State Division in the case of Nqanoyi *v.* Mangoloti [1930, N.A.C. (C. & O.), p. 13], that Roman-Dutch Law must primarily be applied, and it must hold that in the absence of proof that the Native Commissioner has not exercised a judicial discretion in the present

case, his ruling that he will apply Native Law cannot be disturbed, for the cause of action is one common both to Native Law and to Roman-Dutch Law."

The last mentioned case was quoted with approval in Magidela *v.* Sawintshi, 1943, N.A.C. (C. & O.), 52, the learned President, who delivered the judgment of the Court, holding that where the cause of action is known to both systems of law, each providing its own remedy, the presiding Native Commissioner has the choice of applying judicially one or other of such systems.

In *Ex Parte* Minister of Native Affairs in *re* Yako *v.* Beyi, 1948 (1) S.A. 388 (A.D.), the learned Judge of Appeal, delivering the judgment of the Court, stated *inter alia:*—

> "But I do not find it necessary for the purpose of deciding the present matter to hold that such a *prima facie* preference for the use of Common Law exists; and as there are various factors which the Native Commissioner would in one case or another have to take into account and which would ordinarily outweigh any such preference I think that I should assume, what leads for present purposes to the same result, that the Native Commissioner should exercise his discretion without regarding either of the systems of law as *prima facie* applicable. In each case he has at some stage to determine which system of law it would be fairest to apply in deciding the case between the parties. I think that he should only finally decide which system of law he is going to apply after considering all the evidence and argument as part of his eventual decision on the case; but it would probably be convenient in many cases for him to indicate at an earlier stage, and possibly even at the commencement of the trial, what law he would provisionally regard as applicable."

After dealing with the rule of *stare decisis* the learned Judge of Appeal continued: "But the Native Commissioner must of course pay principal regard to the facts of the case before him since the dominant consideration is his own reasoned view as to the best system of law to apply in order to reach a just decision between the parties."

In the light of these decisions, it is clear that the Native Commissioner misdirected himself in applying Common Law in the present case in which both systems of law provide a remedy, solely on the ground that Common Law should be primarily applied and Native Law only invoked in matters peculiar thereto falling outside the principles of Common Law, as held in Nqanoyi's case. Consequently he did not exercise his discretion properly and it therefore remains for this Court to decide in which direction the Native Commissioner should have exercised his discretion in the present case on the basis of which is the best system of law to apply in order to reach a just decision between the parties.

The obligation sought to be enforced in the present case is of a contractual nature, i.e. it is based on an implied contract, in respect of which both systems of law provide a remedy; this Court must therefore ascertain and give effect to the intention of the parties. If it is clear that the parties contemplated Native Law, that law should be applied, otherwise the Common Law obtains, *vide* Magidela's case referred to above, which was quoted with approval in Lebona *v.* Ramokone, 1946, N.A.C. (C. & O.) 14; see also Mashakwe *v.* Mashakwe, 1, N.A.C. (N.-E.), 272.

The parties to the present action are not living under primitive tribal conditions but it is clear from the record of the proceedings in this case that they not only observed Native Law in the matter at issue and in closely allied matters, but also that the matter at issue had its origin in their observance of that system of law.

That this is so, is evidenced by the following factors:—

1. Defendant's union with plaintiff's sister, Elizabeth, *was a customary one and not a marriage according to Common Law* as is clear from paragraph (1) of the particulars of claim and from plaintiff's evidence that that union was founded solely on lobolo.

2. According to plaintiff's evidence, he maintained the children concerned and his sister, Elizabeth, up to her death, *as defendant had not paid lobolo for her but only the "vulamlomo"* fee, which makes it obvious that such maintenance was dictated by Native Law and Custom.

3. Plaintiff stated in his evidence—"defendant never asked me for the children before the last case. I've always been prepared to give him the children since the last case. I've waited for him to bring the balance of the lobolo and fetch the children. Even before the last case I was not refusing with the children but I wanted the balance of the lobolo. I claimed 12 cattle balance at that time. The Court held that the balance of lobolo was only £4. 5s. After the last case defendant did not tender me £4. 5s. and request the children." And according to the record of the proceedings in the present action, the judgment in the previous case between the same parties referred to by plaintiff in his evidence quoted above, was for the return to the present defendant (then plaintiff) by the present plaintiff (then defendant) of the three children concerned *against* the payment by the former to the latter of the sum of £4. 5s. in respect of the balance of the lobolo due for the children's mother. The retention of a wife and children by her father or other person who would be her guardian if she had not contracted a customary union to secure payment of lobolo outstanding for her by such children's father or other person is also a custom peculiar to Native Law which is known as "teleka" or "uku-teleka", *vide* Tiyeka *v.* Feja, 4, N.A.C. 343 (Transkei), and Ntsimango *v.* Ntsimango, 1, N.A.C. (S.) 143.

4. It is clear from the evidence that the amount which was to be paid by defendant to plaintiff for the maintenance of his three children by the latter was neither discussed nor agreed upon by them, which would be an altogether extraordinary mode of dealing if the parties contemplated Common Law, particularly if regard is had to the very lengthy period for which plaintiff maintained the children, viz., from 1st June, 1938, until the issue of the summons in the present case on the 20th September, 1950; but which would be the normal procedure under Native Law which provides for the payment of "isondhlo" (maintenance) in such cases at the rate of one head of cattle per child irrespective of the period of maintenance, *vide* Mbata *v.* Zungu, 1, N.A.C. (N.E.) 72.

5. Plaintiff made no claim for the maintenance of defendant's wife, i.e. of plaintiff's sister, Elizabeth, which is a significant feature in that no such claim lies in Native Law, *vide* Ngxabisa *v.* Ngcobitsha, 1, N.A.C. 30 (Transkei).

6. Plaintiff made no claim for the maintenance of the children over a period of years and only eventually made such claim after having been ordered by the Court in the previous action to return them to defendant, which is a practice much more in keeping with Native Law than Common Law.

7. According to the evidence, plaintiff's mother who took care of the children concerned whilst the former maintained them. received the "vulamlomo" beast and arranged for

the customary union of the eldest girl child and did so with plaintiff's knowledge, thus signifying adherence to Native Law.

8. The relationship of the parties coupled with the fact that no sum for the maintenance of the children was discussed or agreed upon by them over a period of years and no claim therefor made for years also lends colour to the view that the parties had Native Law in mind rather than Common Law in the matter at issue.

It follows that the first ground of appeal is well founded and that the second ground of appeal falls away.

As regards the third ground of appeal, it is clear from his reasons for judgment that the Native Commissioner gave due consideration to the probabilities and improbabilities as were disclosed by the evidence to have been material in deciding to accept the evidence for plaintiff and to reject defendant's evidence and this Court sees no good reason for holding that he was wrong in that finding. As in an appeal based on credibility, an appellant, to succeed, must satisfy the Appellate Tribunal that the Court *a quo* has erred in its finding and as the present appellant has failed to do so, the third ground of appeal fails.

As the first ground of appeal has been sustained, the cross-appeal fails since it is based on the application of Common Law.

In these circumstances the plaintiff is entitled to judgment for three head of cattle as "isondhlo" for having maintained the three children concerned, and this Court would have altered the Native Commissioner's judgment to one for the plaintiff for three head of cattle or their value with costs, if their value could have been determined. Unfortunately there is no evidence in regard thereto and counsel for the parties could not agree upon such value.

In the result the appeal is allowed with costs and the Native Commissioner's judgment is set aside. The record is returned to him for such evidence as either party may desire to adduce in regard to the value of cattle of the nature in question and a fresh judgment for plaintiff for three head of cattle or their value as may be determined by the Native Commissioner on the evidence adduced in regard thereto.

Defendant to pay the costs already incurred in the Court below.

The cross-appeal is dismised with costs.

For Appellant: Mr. Joubert, of Messrs. Reitz, Joubert & v. d. Merwe, Pretoria.

For Respondent: Mr. Goudvis, of Messrs. Austin & Goudvis, Pretoria.

Cases referred to:

Nqanoyi *v.* Njombeni, 1930, N.A.C. (C. & O.), not followed.
Muguboya *v.* Mutato, 1929, N.A.C. (T. & N.), 73.
Ntsabela *v.* Poolo, 1930, N.A.C., (T. & N.), 13.
Moima *v.* Matladi, 1937, N.A.C. (T & N.), 40.
Magidela *v.* Sawintshi, 1943, N.A.C. (C. & O.), 52.
Lebona *v.* Ramokone, 1946, N.A.C. (C. & O.), 14.
Ex Parte Minister of Native Affairs in *re* Jako *v.* Beyi, 1948, (1) S.A. 388 (A.D.).
Mashakwe *v.* Mashakwe, 1, N.A.C. (N.E.), 272.
Ngxabisa *v.* Ngcobitsha, 1, N.A.C. 30 (Transkei).
Ntsimango *v.* Ntsimango, 1, N.A.C. (S), 143.

Statutes:

Section *eleven,* Act No. 38 of 1927.

CASE No. 43 OF 1951.

JOSEPH ZWANE (Appellant) *v.* MSUSENE DHLAMINI (Respondent).

N.A.C. CASE No. 87/51.

PRETORIA: Tuesday, 11th September, 1951. Before Steenkamp, President, and Messrs. Balk and Smithers, Members of the Court, North-eastern Division.

Native Law and Custom—Adulterine children—right to such children during subsistence of a customary union between a woman and the male partner thereto.

Held: That under Native Law the right to be determined is dictated by a customary union; that the adulterine children born to a woman during the subsistence of such a union between her and the male partner thereto, accrue to such male partner and the natural father of such children has no right to them.

Held further: That since under Native Law, as in Common Law, the husband, during the subsistence of the conjugal union between him and his wife, dictates her place of residence and that of their minor children, he has the right to an order of Court against any third party keeping such children against his wishes, for their delivery to him.

Held further: That the granting of the custody of adulterine minor children to the husband of the wife who bore them during the subsistence of their customary union cannot be said to be *contra bonos mores* in any way since, under Native Law, he is both his wife's guardian and the guardian of such adulterine children.

Appeal from the Court of the Native Commissioner, Piet Retief.

Balk (Permanent Member):—

Plaintiff (present respondent) sued defendant (present appellant) in the Native Commissioner's Court for the return of two minor children, costs of suit or such other relief as the Court may deem fit to grant.

In his particulars of claim embodied in the summons, plaintiff averred that—

> "Both parties are Zulus of this district (Piet Retief) and the claim is brought under Native Law and Custom.
>
> Plaintiff and one Ellina Nkambule are married according to Native Law and Custom, and the woman was living in the plaintiff's kraal. Some years ago, during the plaintiff's absence on work, the defendant took the woman away from the plaintiff's kraal or enticed her away, or, alternatively the woman went to stay with the defendant. As a result of such living together the plaintiff's wife had two children aged 5 and 3 years respectively of which the defendant is the father. According to Native Law and Custom the illegitimate children of a married woman rank as the children of her house, which, in this case, is her husband's, the plaintiff's house.
>
> Notwithstanding demand the defendant refuses to return the said children to the plaintiff."

Defendant pleaded as follows:—

> "Defendant admits that plaintiff was married to Ellina Nkambule according to Native Custom. Defendant admits that during plaintiff's absence he lived with the plaintiff's wife and had the two children by her. Defendant denies that

Plaintiff can claim the said two children as that would be *contra bones mores*. Defendant states that plaintiff has never demanded the said children and that in June, 1950, he agreed to accept two head of cattle from defendant for his wrongful act in cohabiting with his wife during his absence."

The presiding Native Commissioner entered judgment for plaintiff as prayed with costs. Against this judgment an appeal has been noted on the grounds that—"it is *contra bonos mores* and tends to rob the natural father of his children to give them to a total stranger."

It is clear from the pleadings that the parties are Zulus, that the two minor children concerned are with defendant, that the customary union between plaintiff and Ellina Nkambule still subsists, that the latter bore those children during the subsistence of that union and that defendant is the natural father of those children.

It is uncertain from the record of the proceedings in this action, whether or not Ellina returned to plaintiff after having lived at defendant's kraal and having had the children in question by him there; however that may be, this aspect is of no consequence since this action was brought solely for the purpose of determining the right to those children as between plaintiff and defendant, and obviously therefore Ellina is not concerned in the matter at issue, and the question whether it would be in the best interests of the children for their mother or her husband to be given their custody does not arise.

Under Native Law, which was applied by the presiding Native Commissioner in the present action, and properly so in that the right to be determined is dictated by a customary union, the adulterine children born to a woman during the subsistence of such a union between her and the male partner thereto, accrue to such male partner and the natural father of such children has no right to them, *vide* Dhlamini *v.* Butelezi, 1946, N.A.C. (T. & N.) 16, quoted with approval in Makwaba *v.* Mhlango, 1947, N.A.C. (T. & N.) 35.

Since under Native Law, as in Common Law, the husband during the subsistence of the conjugal union between him and his wife, dictates her place of residence and that of their minor children, he has the right to an order of Court against any third party keeping such children against his wishes, for their delivery to him, *vide* the cases quoted above and Matebula *v.* Sitole, 1943, N.A.C. (N. & T.) 58, Sibeya *v.* Makakule, 1944, N.A.C. (N. & T.) 2 and Khasi *v.* Tabana, 1944, N.A.C. (N. & T.) 67.

In the present case the return of the children is claimed but it is clear from the pleadings that what is contemplated is the delivery of the children by defendant to plaintiff.

The granting of the custody of adulterine minor children to the husband of the wife who bore them during the subsistence of their customary union cannot be said to be *contra bonos mores* in any way since, under Native Law, he is both his wife's guardian and the guardian of such adulterine children. To grant the custody of such children to their natural father solely on the ground that he is their natural father, would not only be contrary to public policy in that it is opposed to the accepted principles of both Native and Common Law, under which he has no right whatever to them solely on that ground, but would also be *contra bones mores* in that it would tend to encourage immoral relations between men and women by regarding the issue thereof on a par with that of relationships sanctioned by law.

It follows that the grounds of appeal are entirely without substance and the appeal therefore fails.

The appeal is dismissed with costs.

Steenkamp (President): I am prepared to subscribe to the judgment written by my brother Balk, only because there is the assumption that plaintiff's wife is living with him. If husband and wife are not living together I would be very reluctant, in the interests of the welfare of the children, to hand over the care of adulterine children to the husband of the woman who bore them. As between plaintiff and defendant, the former is entitled to the custody, but this does not debar the woman at any time, if she and her husband are separated, to apply to the Court for custody.

Smithers (Member): I concur in the judgment of my brother Balk and with the remarks of the learned President.

For Appellant: Adv. Barnard, instructed by Messrs. Stegmann, Oosthuizen & Jackson, Pretoria.

Respondent—in default.

Decided cases referred to:—

Dhlamini *v.* Butelezi, 1946, N.A.C. (T. & N.) 16.
Makwaba *v.* Mhlongo, 1947, N.A.C. (T. & N.) 35.
Matebula *v.* Sitole, 1943, N.A.C. (T. & N.) 58.
Sibeya *v.* Makakule, 1944, N.A.C. (T. & N.) 2.
Khasi *v.* Tabana, 1944, N.A.C. (T. & N.) 67.

CASE No. 44 OF 1951.

A. J. R. MTIMKULU (Applicant), *v.* LANGA PHUMA SIKOTHE BUS COMPANY (Respondents).

N.A.C. CASE No. 68/51.

VRYHEID: Tuesday, 2nd October, 1951. Before Steenkamp, President, and Messrs. Balk and Thompson, Members of the Court (North-eastern Division).

Practice and procedure—Review on grounds of alleged bias on part of presiding judicial officer—Challenging of Counsel's authority to appear in this Court—Ruling by Court a quo *on an exception is a matter which falls to be taken by way of appeal and not on review.*

Held: In the matter of an objection *in limine* by the applicant to respondents' counsel being heard unless he filed a power of attorney authorising him to represent the respondents in this Court, that as the rules of this Court make no provision for challenging the authority of counsel to appear therein and as it was clear that counsel had been duly instructed to appear for the respondents in accordance with established practice of this Court, and as applicant had failed to show good cause why respondents' counsel should produce documentary proof that he had been authorised to represent them in this matter, such objection must be overruled.

Held: That the exception to the summons taken by the defendant in the Court *a quo,* which appeared to be the only point of substance, was a matter which fell to be taken by way of appeal and not on review.

Review from the Court of the Native Commissioner, Ingwavuma.

Balk (Permanent Member), delivering the judgment of the Court:—

This is an application for review of certain civil proceedings instituted in the Court of the Native Commissioner at Ingwavuma by an unincorporated association of Natives known as the Langa

Phuma Sikothe Bus Company (present respondents) against the defendant (present applicant), which resulted in judgment being entered for the plaintiff company as prayed with costs and in the defendant's counter-claim being dismissed for lack of prosecution.

The application is embodied in an affidavit by the defendant alleging a number of irregularities which are difficult to follow, but which would appear to resolve themselves to the following:—

(1) That postponements were wrongly granted to the plaintiff company.

(2) That Vukudhle Mbuyazi (a member of the plaintiff company) gave evidence for the plaintiffs against their will.

(3) That Vukudhle had failed to produce certain letters as instructed and that the Court *a quo* could not therefore call Mcilwane Mtiyane (another member of the plaintiff company) until Vukudhle had produced this correspondence.

(4) That Vukudhle was appointed spokesman at the suggestion of the Court *a quo* and against the wishes of the plaintiffs.

(5) That the plaintiffs did not want to bring the present action, as they maintained that the matter at issue had been decided in previous actions between them and the defendant and that they had in fact not authorised the issue of summons in the present case.

(6) That Mcilwane and Mtateni Mtiyane (another member of the plaintiff company) did not wish to give evidence and were warned by the Court interpreter that they had to do so.

(7) That the judgment entered for plaintiffs in the present action was neither interpreted nor recorded.

(8) That the plaintiffs' attorney had not asked for judgment.

(9) That the Court *a quo* overruled the defendant's objection to Mcilwane's giving evidence and thereby prejudiced the defendant by depriving him of the opportunity of having the letters referred to above, which were material to the defendant's case, produced in evidence.

(10) That the defendant's exception to the summons in the Court *a quo* on the grounds that the plaintiffs had no *locus standi in judicio* to sue as the Langa Phuma Sikothe Bus Company, was wrongly overruled by the presiding Assistant Native Commissioner.

(11) That the presiding Assistant Native Commissioner was actuated by bias in overruling that exception.

(12) That Vukudhle's evidence, although contradictory, favoured the claim in reconvention.

(13) That Vukudhle's evidence revealed a conspiracy.

(14) That the Native Commissioner, Empangeni, who was a Member of the Native Appeal Court as constituted on the 18th July, 1950, wrongly took part in adjudicating upon a previous action on review as he was previously aware of the nature of that case.

(15) That the departure of the Court *a quo* from the recognised procedure prevented the defendant from handing in certain documents, viz. (*a*) a certified copy of the Deed of Sale; (*b*) an identity card in respect of the bus in question; (*c*) a permit counterfoil issued under Motor Vehicle Ordinance, No. 10 of 1937, at the instance of Mtateni; and (*d*) a certain letter from Vukudhle Mbuyazi.

The applicant, who prosecuted the application in person, objected to the respondents' counsel being heard unless he filed a power of attorney authorising him to represent the respondents in this Court. The rules of this Court make no provision for

challenging the authority of counsel to appear therein, and the applicant failed to show good cause why the respondents' counsel should produce documentary proof that he had been authorised to represent them in this Court. Counsel in his reply intimated that he had been duly instructed to appear for the respondents in accordance with the established practice of this Court. In the circumstances the objection was overruled.

The record of the proceedings in the action must be presumed to be correst in the absence of any specific averment and proof to the contrary.

It is manifest from the record that the judgment was duly entered on the day on which it was given, that Vukudhle was the only person who gave evidence, and that the procedure as a whole was in accordance with established practice.

The applicant contended in this Court that the record supported the irregularities relied upon by him, but he was unable to show that this was the position.

With the exception of the so-called irregularity referred to in sub-paragraph (10) above, the irregularities alleged by the applicant have either not been substantiated or are irrelevant, and it is clear from the record and the Presiding Assistant Native Commissioner's reasons for judgment supported by an affidavit by the Court interpreter, that the defendant's attitude in the Court *a quo* was one of defiance and obstruction and that he deliberately withdrew from the proceedings in that Court before the plaintiffs had closed their case and after the consequences of such withdrawal had been explained to him by the presiding judicial officer.

The exception to the summons taken by the defendant in the Court *a quo* on the ground that the plaintiffs had no *locus standi in judicio* to sue as a company, *vide* sub-paragraph (10) above, is a matter which falls to be taken by way of appeal and not on review.

The applicant, in the course of his address, made certain improper allegations against the judicial officer in the Court below. These allegations of bias were without substance, and the applicant would be well advised to refrain from accusing judicial officers of improper conduct unless he is in a position to substantiate it. He even went so far as to accuse the Native Commissioner, Empangeni, of impropriety in connection with the latter's having adjudicated in his capacity as a member of this Court upon a previous application for review made by the applicant in another case. This accusation was both uncalled for and unseemly. The applicant's whole attitude, even if viewed in the most favourable light, indicates clearly that he gives unbridled vent to grievances which he cannot substantiate, to an extent that has resulted in the Court *a quo's* being obstructed in its functions

In the result, the application fails, and it is accordingly dismissed with costs.

Steenkamp (President): Applicant was ill advised to have applied for review of the proceedings, when he could have appealed against the decision of the Native Commissioner on the question of the capacity of the plaintiffs.

For Applicant: In person.

For Respondents: Mr. A. G. Turton, instructed by G. D. E. Davidson, Esq., Empangeni.

CASE No. 45 OF 1951.

MAKHULUMA FAKUDE (Applicant) *v.* MAGWEBEDLANA NKWANYANA (Respondent).

N.A.C. CASE No. 40/51.

VRYHEID: Wednesday, 3rd October, 1951. Before Steenkamp, President, Balk and Thompson, Members of the Court (North-eastern Division).

Native Appeal Cases—Application for leave to appeal to Appellate Division—Considerations.

Held: That the fact that the members of this Court did not agree with the President when the action concerned was brought on appeal before this Court goes to show that the salient points in the case are arguable.

Held further: That the payment of an amount of £120, which defendant denies he owes, must be of substantial interest to him personally.

Held further: That the amount in dispute in this case is not trivial in comparison with the costs of the contemplated appeal.

Appeal from the Court of the Native Commissioner, Nongoma.
Steenkamp (President):—

On the 26th June, 1951, the majority of this Court confirmed a judgment of the Native Commissioner's Court, which was in favour of plaintiff (now respondent) for £120 and costs.

Application is now made by defendant in terms of section *eighteen* (1) of the Native Administration Act, No. 38 of 1927, for leave to appeal to the Appellate Division of the Supreme Court of South Africa.

The points defendant desires to take on appeal are:—

(1) The case in respect of which the said appeal was heard related to a matter of considerable amount in that judgment was given against me to pay a sum of one hundred and twenty pounds (£120) which is a large sum of money and which money I never borrowed from the respondent nor did I receive the sum from him.

(2) In the said matter there are questions of law and fact involved.

(3) The questions of law are:—

(*a*) As to whether the presiding Magistrate in the Court below was justified without any evidence in assuming from demeanour alone that one party was illiterate and for the most part inexperienced in business dealings and that the other party was a shrewd businessman.

(*b*) Whether the facts justified the finding of the Court below; and in that respect I humbly submit that—

(i) the facts proved were of such a nature that they could not possibly carry conviction to the reasonable mind;

(ii) that the probabilities of the case if evenly balanced did not justify a finding against me.

The points are not concise and this Court, in granting the necessary leave, will curtail them to a reasonably abbreviated form.

This Court, in exercising its discretion, will be guided by those considerations which weigh with the Appellate Division in similar applications, and these are—

(*a*) good reasons for believing that the appeal might succeed, i.e. the point must be arguable;
(*b*) the matter submitted must be of general or substantial importance to the parties; and
(*c*) the amount involved is not trivial in comparison with the costs which may be incurred.

The fact that the members of the Court could not agree with the President goes to show that the salient points in the case are arguable. The plaintiff in the Court below alleged that he lent the defendant £120 in cash, which defendant denied. The onus was on plaintiff to prove the loan and the question arises whether he has discharged that onus. Counsel for applicant has also raised the question that apart from proving the loan, the plaintiff also had to satisfy the Court that if it was found a loan had been made, repayment thereof had become due.

There can be no doubt that the payment of an amount of £120 which defendant denies he owes, must be of substantial importance to him personally.

The next question is whether the amount is not trivial in comparison with the costs which may be incurred. We have consulted various authorities. In the case of Macdonald *v.* Johannesburg City Council, 1934, A.D. 234, it was held that £72 is not a substantial amount. In De Wet *v.* Union Government, 1933, A.D. 200, an amount of £75 was reckoned not to be of substantial importance between the parties, but as the costs of bringing the matter on appeal before the Appellate Division was estimated to be relatively small, it appeared that £75 may, in that particular case, be considered to be sufficiently substantial in relation to costs.

In the present application we consider that an amount of £120 is substantial in so far as the defendant is concerned. The record is not very long and the arguments which either party might wish to advance in prosecuting or defending the appeal will not call for extraordinary preparation, and the costs should therefore not be out of the ordinary.

In the circumstances, leave is granted in terms of section *eighteen* of Act No. 38 of 1927, to appeal to the Appellate Division on the following point:—

> "Whether the plaintiff in the Native Commissioner's Court discharged the onus of proof that defendant had borrowed an amount of £120 from him."

Counsel for applicant has argued that this Court should add to the above point the words—

> "and whether, if it is found the loan had been made, repayment thereof had become due when action was instituted."

We are not prepared to do so as this is of a trivial nature, and if applicant is unsuccessful on the point reserved and successful on the other, plaintiff can immediately sue for the recovery of the loan, thereby incurring unnecessary additional costs.

As already mentioned, the costs should not be too high and we are of opinion that a deposit of £40 as security for respondent's costs in the Appellate Division will suffice, and it is accordingly ordered that this amount be deposited, or other satisfactory security be given.

Thompson (Member): I agree with the learned President.

Balk (Permanent Member):

The difference in opinion disclosed by the majority and dissenting judgments given in this action on appeal to this Court indicates that the applicant has an arguable case and therefore he

cannot be said not to have a reasonable prospect of success on appeal to the Appellate Division of the Supreme Court on the merits of the case.

The record is not a long one and the costs of bringing the matter in appeal to that Court will, therefore, be relatively small. The £120 in issue in this case therefore appears to be sufficiently substantial in relation to the costs of the contemplated appeal and thus constitutes an amount of "real or substantial importance between the parties" in terms of Haine *v.* Podlashuc & Nicolson, 1933, A.D. 104, *vide* also De Wet *v.* Union Government, 1933, A.D. 200.

I therefore agree that the application should be granted subject to the applicant's depositing the sum of £40 as security for the respondent's costs in the Appellate Division, or furnishing other satisfactory security in that amount.

As the contemplated appeal resolves itself to one on fact and as in such cases the appellant, to succeed, must satisfy the Appellate Tribunal that the Court *a quo* erred in its findings, the matter for decision, in my view, should be whether on the evidence adduced before the Native Commissioner, he was wrong in his findings of fact, regard being had to his reasons for judgment and to the arguments advanced by the appellant, and, if so, what the proper judgment in the Native Commissioner's Court should be.

EDITOR'S NOTE.—It is not necessary for the purposes of this report to set out the judgment of the Native Appeal Court (North-eastern Division) against which it is desired to appeal, as it was based purely on fact.

For Applicant: Mr. A. G. Turton, instructed by Messrs. Cowley & Cowley, Durban.

For Respondent: Mr. Conradie, of Messrs. Conradie & Wright, Vryheid.

Cases referred to:

McDonald *v.* Johannesburg City Council, 1934, A.D. 234.

De Wet *v.* Union Government, 1933, A.D. 200.

Haine *v.* Podlashuc & Nicholson, 1933, A.D. 104.

Statutes:

Section *eighteen* (1) of Act No. 38 of 1927.

CASE No. 46 OF 1951.

THOKOZILE MKIZE (Appellant) *v.* MAFEZULU MKIZE (Respondent).

N.A.C. CASE No. 105/51.

PIETERMARITZBURG: Wednesday, 17th October, 1951. Before Steenkamp, President, and Messrs. Balk and Gillbanks, Members of the Court (North-eastern Division).

Native Law and Custom—Custody of children on dissolution of customary union—Refund of lobolo on such dissolution.

Practice and Procedure: Locus standi in judicio to bring appeal —Citing of parties— Grounds of appeal—Costs of appeal.

Held: That on dissolution of customary union, the criterion in so far as concerns the question of whether the husband or wife should have custody of the minor children of such union, is which course would be in the best interests of those children.

Held further. That in Native Law the father or lawful guardian of the woman, and not such woman, is responsible on the dissolution of her customary union for the refund of such of the lobola cattle paid in respect thereof as may be refundable.

Held further: That where an order for return of lobola cattle embodied in a judgment dissolving a customary union is on the face of it directed against the wife and not against the father, she has *locus standi in judicio* to bring an appeal against such order.

Held further: That as the wife's father was not cited as co-defendant in the action for the dissolution of her customary union, it was not competent for the Court to order him to return the lobola cattle concerned.

Held further: That as appellant had not been represented in the Court below it was not necessary for her to specify the grounds of appeal in the relative notice and that if Counsel for respondent had desired to be furnished with those grounds prior to the hearing of the appeal, he could have made application therefor to appellant's attorney who signed the notice of appeal.

Held further: That in those circumstances and as appellant had succeeded on one of the points taken by her on appeal, which was of substance, she should be awarded costs of appeal.

Appeal from the Court of the Native Commissioner, Camperdown.

Balk (Permanent Member) delivering the judgment of the Court:—

The plaintiff (present respondent) sued the defendant (present appellant), duly assisted by her father, in the Native Commissioner's Court at Camperdown for an order dissolving their customary union on the grounds of wilful and malicious desertion and for the custody of the minor children thereof.

The defendant in her plea resisted the plaintiff's claim and stated that he had chased her away.

The presiding Native Commissioner at the conclusion of the trial entered the following judgment:—

> "Ordered that the union be dissolved. That the woman reverts to the kraal and custody of her guardian. That plaintiff shall have custody of the children and that seven head of lobola cattle shall be returned."

The present appeal has been brought on general grounds and is confined to the orders regarding the custody of the children and the return of the lobolo.

The criterion in so far as concerns the question of whether the plaintiff or the defendant should have the custody of the minor children of their customary union, is which course would be in the best interests of those children, *vide* Maruping *v.* Maruping, 1947, N.A.C. (T. & N.) 129, Nkosi *v.* Ngubo, 1, N.A.C. (N.E.) 87, Mkize *v.* Mkize, N.A.C. (N.E.) Case No. 63/1951 (not yet reported), and Fletcher *v.* Fletcher, 1948 (1) S.A. 130 (A.D.).

In the present action the evidence fully supports the Native Commissioner's finding that the Defendant had neglected the children concerned, and that the plaintiff is a fit and proper person to have their custody and in a position to care for them properly. Although it emerges from the evidence that these children are very young—there is no indication of their actual or approximate age—it is obvious that in the circumstances of this case it is in their best interests that their father, the plaintiff, should have their custody.

It follows that the appeal in regard to this portion of the judgment fails.

Coming to the appeal against the remaining portion of the judgment, i.e. the order for the return of the lobolo cattle, counsel for respondent *in limine* took the point that the appellant had no *locus standi in judicio* to bring the appeal in this respect as that order was intended to be operative only against the defendant's father who was not a party to the action.

It is clear from the record that the defendant's father was not cited as co-defendant and that he appeared in this action solely for the purpose of assisting the defendant. Consequently it was not competent for the Court *a quo* to order him to return the lobolo cattle in question, *vide* section *eighty* of the Natal Code of Native Law, published under Proclamation No. 168 of 1932, as amended, and Xulu *v.* Mtetwa, 1947, N.A.C. (T. & N.), 32, Mtshali *v.* Mtshali, 1, N.A.C. (N.E.), 119, Zulu *v.* Nkosi, 1, N.A.C. (N.E), 227 and Masoka *v.* Mcunu, N.A.C. (N.E.), Case No. 14 of 1951 (not yet reported). For this reason and in view of the language in which the order in question is couched, that order must be construed as being directed against the defendant and not against her father. It was therefore ruled that the point in question had not been well taken.

In Native Law, the father or other lawful guardian of a woman, and not such woman, is responsible on the dissolution of her customary union for the refund of such of the lobolo paid in respect thereof as may be returnable. It follows that the order in this respect in the present instance was not competent and the appeal in regard thereto therefore succeeds.

Counsel for respondent submitted that in the event of the appeal succeeding only in regard to the order for the return of the lobolo cattle, the appellant should not be awarded costs of appeal. He contended that had he been furnished with the grounds of appeal prior to the hearing thereof, he may well have abandoned the portion of the judgment relating to that order, and thus have saved costs.

As the appellant was not represented by a legal practitioner in the Court below, it was not incumbent on her, in terms of Rule 10 of the Rules of this Court published under Government Notice No. 2254 of 1928, to specify the grounds of appeal in the relative notice and if counsel for respondent desired to be furnished with those grounds prior to the hearing of the appeal, he could have had application made therefor to the appellant's attorney who signed the notice of appeal. That being so and as the appellant has succeeded on one of the points taken by her on appeal, which was of substance, she should be awarded costs of appeal, *vide* the penultimate paragraph on page 246 of the *Law of Costs in South Africa* by Rubin, and the relative authority cited at the foot of that page.

In the result the appeal is allowed with costs in so far as the Native Commissioner's order for the return of the lobolo cattle is concerned, and his judgment is amended by the deletion of the words "and that 7 head of lobolo cattle shall be returned".

For Appellant: Mr. A. Manning, of Messrs. McGibbon & Brokensha, Pietermaritzburg.

For Respondent: Adv. W. G. Seymour, instructed by Messrs. Randles & Davis, Pietermaritzburg.

Cases referred to:—

Maruping *v.* Maruping, 1947, N.A.C. (T. & N.) 129.
Nkosi *v.* Ngubo, 1, N.A.C. (N.E.) 87.
Mkize *v.* Mkize, N.A.C. (N.E.) Case No. 63/1951 (not yet reported).

Fletcher *v.* Fletcher, 1948 (1) S.A. 130, A.D.
Xulu *v.* Mtetwa, 1947, N.A.C. (T. & N.) 32.
Mtshali *v.* Mtshali, 1, N.A.C. (N.E.) 119.
Zulu *v.* Nkozi, 1, N.A.C. (N.E.) 227.
Masoka *v.* Mcunu, N.A.C. (N.E.), Case No. 14/1951 (not yet reported).

Statutes, etc.

Section *eighty* of the Natal Code of Native Law.
Rule 10 of the Rules of this Court (Govt. Notice No. 2254 of 1928).

CASE No. 47 OF 1951.

THOMAS ZULU (Appellant) *v.* WALTER SIBIYA (Respondent).
N.A.C. CASE No. 70/51.

PIETERMARITZBURG: Wednesday, 17th October, 1951. Before Steenkamp, President, and Messrs. Balk and Gillbanks, Members of the Court (North-eastern Division).

Jurisdiction—Cause of action arising in area of jurisdiction of Court—Section ten (3) *of Native Administration Act,* 1927, *as amended.*

Practice and Procedure: Admission of document not in either official language—Translation into one of the official languages to be handed in with such document.

Held: That the expression "the cause of action in that case arose in that area" contained in paragraph (*b*) of the proviso to sub-section (3) of section *ten* of the Native Administration Act, 1927, as amended, means that such cause of action arose *wholly* in the area concerned.

Held further: That as defendant had signed the agreement of sale relied upon outside of the area of jurisdiction of the Court below and as a material fact which plaintiff had to prove in order to succeed in the present action was that defendant had signed that agreement, the cause of action did not arise wholly in the area of the said Court's jurisdiction.

Addendum: Presiding judicial officers in Native Commissioners' Courts are in no circumstances to admit any document, written in a Native language, as an exhibit, unless accompanied by a translation into either of the official languages.

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

Balk (Permanent Member), delivering the judgment of the Court:—

Plaintiff (present appellant) sued defendant (present respondent) in the Native Commissioner's Court at Pietermaritzburg, claiming the cancellation of a certain written agreement of sale which had been entered into between them and the forfeiture in terms of Condition 6 of that agreement, of all payments made to him by defendant thereunder.

Defendant in his plea took the point that the Court had no jurisdiction to try this case as the whole cause of action therein did not arise within the area of its jurisdiction.

The presiding Acting Additional Native Commissioner dismissed the summons with costs for want of jurisdiction and the appeal is based on the ground that he erred in so doing.

It is clear from the record of this case that the defendant does not reside within the area of the said Court's jurisdiction and there is nothing therein to indicate that defendant carries on business or is employed within that area, nor that he agreed in writing to that Court's jurisdiction.

It follows that, in terms of sub-section (3) of section *ten* of the Native Administration Act, No. 38 of 1927, as amended, the said Court has no jurisdiction unless the cause of action in this case arose in the said area.

In Gebe *v.* Tshika, 1, N.A.C. (S.), 244, it was held that the expression "the cause of action in that case arose in that area" contained in paragraph (*b*) of the above-mentioned sub-section, means that such cause of action arose *wholly* in the area concerned and this Court agrees with that view.

It is clear from the relative written agreement of sale which was put in at the hearing that it was signed by defendant as purchaser, at Iswepe in the Piet Retief district, which falls outside of the area of jurisdiction of the Court *a quo*.

In Cook *v.* Gill, L.R. 8, C.P., 107, it was laid down that every fact which is material to be proved to entitle the plaintiff to succeed and every fact which the defendant would have a right to traverse, forms an essential part of the cause of action. This definition was adopted by the Appellate Division in McKenzie *v.* Farmers' Co-operative Meat Industries, Ltd., 1922, A.D., 16, and has been consistently followed since.

A material fact which plaintiff has to prove in order to succeed in the present action, is that defendant signed the agreement of sale concerned and as defendant signed it outside the area of jurisdiction of the Court below, the cause of action did not arise wholly in that area, *vide* Salmon *v.* Moni's Wineries, 1932, C.P.D. 127.

Counsel for appellant contended that the present action was distinguishable from Salmon's case (supra) in that in the present instance the plaintiff could rely on a prior verbal agreement of sale with the defendant and part performance thereof by the latter. But the summons and the plaintiff's evidence in the present case indicate that he in fact relied upon the written agreement and not on the prior verbal one. That this is the position is manifest from—

(*a*) the particulars of claim in his summons which read as follows:—

> "1. Plaintiff and defendant entered into an agreement of sale, a copy whereof is annexed hereto, marked 'A'.
> 2. Defendant has defaulted in his payments which are to be made in terms of the agreement.
> 3. The whole cause of action arose in this district.
>
> Wherefore plaintiff prays for an order declaring:—
>
> (1) The agreement cancelled.
> (2) All payments made by the defendant to the plaintiff to be forfeited, all in terms of Condition 6 of the agreement.";

(*b*) the fact that the written agreement differed in several respects from the prior verbal one, viz., as regards the clause providing for the cancellation of the agreement and the forfeiture of any payments made by the defendant and also in regard to the defendant's right to occupy the immovable property which formed the subject matter of the sale in question, as is apparent from plaintiff's evidence as follows:—

> "The defendant came personally to my kraal and stated he had heard I had land of which I wanted to dispose. I told him I had land. On same day I took him to my agent Mr. Forsyth, where we discussed matter

and entered into an agreement of purchase and sale in Mr. Forsyth's office. I told Mr. Forsyth the terms of the proposed sale and defendant agreed to them. The agreement was not drawn that day, but Mr. Forsyth told defendant he would have to pay the fees as he was in a hurry to go back. Mr. Forsyth posted agreement to him. It was returned to Mr. Forsyth. I then signed it. I kept a copy of agreement. I don't know whether a copy was sent to defendant. I don't know who signed agreement for defendant. He never at any time said he hadn't signed agreement or that he was not bound by agreement. He made payments under agreement but not regularly. The purchase price was £320. He has paid £190. I ask for the forfeiture of this £190 in terms of agreement on grounds defendant did not pay regularly."

And under cross-examination:—

"I told Mr. Forsyth to draw up our agreement. I said moneys payable by the buyer should be sent to Mr. Forsyth and that when full purchase price paid Mr. Forsyth and I would then transfer property and give defendant title. I told Mr. Forsyth that if the buyer failed for two months to pay instalments I would take possession of land and defendant would lose it. That is all as far as I can remember. Defendant agreed to that. The agreement was to effect that from that day the defendant could make use of land as he pleased. I told defendant that verbally in Mr. Forsyth's office and presence. I didn't ask Mr. Forsyth to embody that in agreement."

It must be added that the written agreement makes provision for its cancellation at the option of the plaintiff and for the forfeiture of any payments made thereunder by the defendant in the event of the latter's being in arrear with any one instalment for a period exceeding seven days and that it is silent as regards the defendant's right to occupy the immovable property concerned.

The difference regarding the condition relating to the forfeiture of payments is a most material one as this condition forms the basis of part of the plaintiff's claim, and can only be founded on the written agreement as is obvious from his evidence quoted above. It follows that the present action is not distinguishable from Salmon's case (supra).

The appeal accordingly fails, and is dismissed with costs.

It is observed that a letter written in a Native language was handed in as an exhibit in this action without a translation in one of the official languages. As pointed out by the learned President of this Court in Zwane *v.* Ngidi (Case No. 54/1951), presiding judicial officers in Native Commissioners' Courts are in no circumstances to admit any such document as an exhibit unless accompanied by such a translation. In fairness to the officer who presided in the present action, it must be added that the last-mentioned case has not as yet been reported.

For Appellant: Adv. J. J. Boshoff, instructed by Messrs. Raulstone & Co., Pietermaritzburg.

For Respondent: Mr. L. Weinberg, of Messrs. Nathan & Co., Pietermaritzburg.

Cases referred to:—

Gebe *v.* Tshika, 1, N.A.C. (S.), 244.
Cook *v.* Gill, L.R. 8, C.P. 107.
McKenzie *v.* Farmers' Co-operative Meat Industries, Ltd., 1922, A.D. 16.
Salmon *v.* Moni's Wineries, 1932, C.P.D., 127.
Zwane *v.* Ngidi, N.A.C. (N.E.), Case No. 54/1951.

Statutes:—

Section *ten* (3) of Act No. 38 of 1927.

CASE No. 48 OF 1951.

MBUKISO SONI (Appellant) *v.* YEZENI SONI (Respondent).
N.A.C. CASE No. 74/51.

PIETERMARITZBURG: Wednesday, 17th October, 1951. Before Steenkamp, President, and Messrs. Balk and Gillbanks, Members of the Court (North-eastern Division).

Native Law and Custom—Succession—Whether immovables can form house property in Natal—Devolution and administration of house property in terms of section one hundred and eight (2) *of the Natal Code of Native Law—Rights of heir of junior house to property pertaining to his house.*

Practice and Procedure: Formulation of claim. Non-joinder of other apparently interested persons. Whether plaintiff bound in present action by claim in prior one which not proceeded with.

Held: That immovables can form house property in Natal and that consequently the immovable property in question in the particular circumstances of this case, devolves and falls to be administered according to Native Law in terms of section *one hundred and eight* (2) of the *Natal Code of Native Law* published under Proclamation No. 168 of 1932 (as amended).

Held further: That in Native Law the general heir of a deceased kraal head has no claim to the property of the latter's junior houses in which there are heirs and that the property in each such junior house is administered and controlled by the heir of the junior house concerned.

Held further: That it was clear from the language in which plaintiff's claim was couched, that what he in fact asked for was a finding that he was entitled to have the ownership of 7/16ths of the immovable property in question transferred to him, and an order of the Court to give effect thereto.

Held further: That in the circumstances of this case, non-joinder of other apparently interested persons could not be relied upon by appellant.

Held further: That the mere fact that the plaintiff (present respondent) limited his claim to the £70 contributed by his house towards the purchase price of the said immovable property, and did not claim transfer of a share of that property in the prior action which was not proceeded with, did not preclude his advancing the latter claim in the present case.

Appeal from the Court of the Native Commissioner, Ixopo.

Balk (Permanent Member), delivering the judgment of the Court:—

Plaintiff (present appellant) sued defendant (present respondent) in the Native Commissioner's Court at Ixopo as follows:—

"1. Plaintiff is Mbukiso Soni an adult Native male in his capacity as representative of the Estate of the 4th house in the kraal of the late Mrau Soni.

2. Defendant is Yezemi Soni, a Native male adult, in his capacity as general heir to his late father Mrau Soni and is resident within the district of Ixopo.

3. During his lifetime the late Mrau Soni acquired immovable property which he held under Title Deed No. 3721/1925 at a price of £160.

4. The late Mrau Soni obtained £70 from his 4th house as a contribution towards the purchase price of the said property stating that the 4th house shall be entitled to receive pro rata share of the land. The said amount was house property.

5. Defendant has wrongfully, unlawfully and without plaintiff's knowledge and consent sold the said land to one Felokwake Ciliza and despite demand made has neglected and refused to cause a survey to be made and to allow the plaintiff to transfer his share into his own name.

Wherefore plaintiff claims:—

(*a*) An order declaring plaintiff to be the owner of 7/16ths of the said land, i.e. on a pro rata basis according to the amount contributed;

(*b*) an order calling upon defendant to sign and execute all documents to enable plaintiff to obtain transfer of his share of the land.

Alternatively to (*a*) and (*b*)—

(*c*) refund the amount of £70 paid as contributed towards the purchase price together with damages calculated at the rate of the difference of the value of the land in 1935 and the value of the land at the date of trial of this action;

(*d*) alternative relief;

(*e*) costs of suit."

Defendant pleaded and counterclaimed as follows:—

"1. Defendant denies that plaintiff's house contributed towards the purchase price of the land and even if it did that merely founds a claim against the Estate of the late Mrau for a refund of the money contributed, but in no circumstances does it found a claim to the land or any portion thereof in the absence of a written instrument signed by the late Mrau.

2. Defendant is the general heir of the late Mrau and as such the land in question which is registered solely in the name of the late Mrau devolves upon the defendant who as such heir has sold the property to Felokwake Ciliza.

3. In the event of it being found that plaintiff's house did contribute towards the purchase price, defendant pleads that plaintiff has been reimbursed for such contribution by having been allowed to occupy the farm with four (4) huts and fields since the death in 1933 of the late Mrau which at the rate of three pounds (£3) per hut per annum amounts to two hundred and sixteen pounds (£216) and in reconvention defendant claims a declaration that plaintiff has feen fully compensated for any contribution his house may have made."

The presiding Additional Native Commissioner entered the following judgment:—

"Main Claim: For plaintiff for £70 and costs.

Claim in Reconvention: Absolution from the instance with costs."

The appeal brought by plaintiff is solely against the judgment on the claim in convention and is based on the following grounds:—

"1. Upon the evidence adduced before the Court the learned Assistant Native Commissioner should have held that plaintiff's house contributed £70 towards the purchase price of the land in dispute and thus did obtain by virtue of the said contribution ownership in and to the said land to the extent of the said contribution of £70.

Alternatively:—

2. The learned Assistant Native Commissioner erred in concluding from the evidence adduced that the contribution of £70 by plaintiff's house towards the purchase price of the land in dispute in this case amounted to a loan to defendant's house, but should have held that the said

amount was in fact paid plaintiff's house with the intention of vesting the said house with ownership in and to the said property to the extent of £70 on a pro rata share, with the other two contributions."

This Court is not concerned with the judgment on the counter-claim, as plaintiff has not noted an appeal against it and there is no cross-appeal.

The evidence establishes that—

(1) plaintiff is the heir of the fourth house of the late Mrau Soni (hereinafter referred to as "the deceased");

(2) defendant is the deceased's general heir;

(3) the deceased purchased the immovable property in question for £160 and received transfer thereof;

(4) the deceased used money which was the property of his several houses, to pay the whole of the purchase price of the said immovable property, taking—

(*a*) £70 from his fourth house, of which plaintiff is the heir;

(*b*) £20 from his first house, i.e. his "Indhlunkulu", of which defendant is the heir and as such also the general heir;

(*c*) £20 from his second house; and

(*d*) £50 from his third house;

(5) the deceased, after purchasing the said immovable property, moved his second, third and fourth houses thereto;

(6) defendant was invited to reside on the said immovable property but declined to do so;

(7) the moneys taken by the deceased from his several houses formed contributions towards the purchase price of the said immovable property and not loans, and it was his intention that this property should form joint house property;

(8) the said immovable property was sold by defendant to one Felokwake Ciliza but that the title deed thereto is still registered in the deceased's name.

The question to be determined is whether or not immovables can form "house" property in Natal. The Common Law conception of individual ownership of land appears to have had no place in Native Law before contact with European civilisation. The position in this respect has, however, not remained static but has been modified by long and increasing usage, as a result of which the concept of individual ownership of immovables has gained general acceptance amongst Natives. This development in Native Law has been accorded recognition by the legislature as is evident from—

(*a*) the fact that in section *one hundred and eight* (2) of the Natal Code of Native Law, published under Proclamation No. 168 of 1932, as amended, which deals with the devolution and administration of "house" property upon the death of the kraal head, no distinction has been drawn between movables and immovables; and

(*b*) sections 2 (*e*) and 4 of the Regulations Governing the Administration and Distribution of Native Estates, published under Government Notice No. 1664 of 1929, as amended, which provide for the distribution of *immovable property according to Native Law.*

In these circumstances it seems clear that immovables can form "house" property in Natal.

In the present instance it is manifest that the immovable property concerned was acquired by the deceased with money, which was the property of his several houses, not in the form of a loan but as a contribution towards its acquisition, and that it was his intention that this immovable property should constitute joint house property. Consequently the immovable property in

question devolves and must be administered according to Native Law in terms of section *one hundred and eight* (2) of the Code referred to above.

In Native Law the generai heir of a deceased kraalhead has no claim to the property of the latter's junior houses in which there are heirs, *vide* Sechabela *v.* Mahlafuna, 1944, N.A.C. (T. & N.), 64, and the property in each such junior house is administered and controlled by the heir of the junior house concerned who is entitled to have the property of his house delivered to him; see Kekana *v.* Kekana, 1945, N.A.C. (T. & N.), 39.

It follows that the plaintiff is entitled to have his share of the immovable property in question transferred to him and natural justice dictates that such share should be proportionate to the contribution from his house towards the purchase price, viz., seven-sixteenths. That this is the position is conceded by the presiding Additional Native Commissioner in his reasons for judgment.

It was contended in the Court below that plaintiff could not succeed in his claim to have his share of the said immovable property transferred to him in view of the provisions of section *one* of Act No. 12 of 1884 of Natal, but, as conceded by Counsel for respondent, this contention is without substance in that plaintiff's claim is not founded on any contract, but on inheritance according to Native Law.

Counsel for respondent contended that the plaintiff could not succeed in his appeal in any event, in that—

(*a*) in his summons he had claimed an order declaring him to be the owner of 7/16ths of the immovable property in question, which it was not legally competent for him to do as the ownership thereof was vested in the deceased's estate;

(*b*) the other apparently interested persons, i.e. the heirs of the deceased's second and third houses, had not been joined in the action;

(*c*) he (plaintiff) had elected in a previous action between him and the present defendant, which was not proceeded with, to claim only the £70 contributed by his house towards the purchase price of the said immovable property and he therefore was precluded from claiming transfer of a share of that property in the present action.

As regards the first contention it is clear from paragraphs (*a*) and (*b*) of the plaintiff's claim quoted above, that what he in fact asked for was a finding that he was entitled to have the ownership of 7/16ths of the said immovable property transferred to him, and an order of the Court to give effect thereto.

Coming to the second contention, non-joinder was not pleaded and there is no indication in the record that this point was raised at any stage in the Court *a quo*. Moreover the other apparently interested persons concerned are not the owners of the said immovable property or any portion thereof, nor is there any evidence that they are making any claim to that property; nor has it been shown that any prejudice to the defendant has resulted from their non-joinder.

As far as the third contention is concerned, the mere fact that the plaintiff did not claim transfer of a share of the said immovable property in the prior action, which was not proceeded with, does not preclude his doing so in the present case, *vide* Jajbhay *v.* Cassim, 1939, A.D. 537, in so far as it deals with the judgment in the case of Brandt *v.* Bergstedt, 1917, C.P.D. 344, and the report of the latter judgment.

In these circumstances these contentions are without substance.

Plaintiff's claim is for an order on defendant compelling him to give effect to the transfer in question, but this Court considers that with a view to expediting the execution of any such order it would be preferable to direct it to the Clerk of the Court *a quo*.

In the result the appeal is allowed with costs and the judgment of the Court *a quo* on the claim in convention is altered to read as follows:—

"It is ordered that the Clerk of the Native Commissioner's Court at Ixopo shall, in his official capacity and for the purpose of this case only, represent the estate of the late Mrau Soni and sign all the necessary documents required to effect transfer from that estate to the plaintiff, Mbukiso Soni, of an undivided seven-sixteenths of the following property subject to the payment by the latter of succession, transfer or any other duty or fee that may be payable to effect such transfer, and subject further to the servitude recorded in Deed of Transfer No. 3721/1925, dated the 12th September, 1925, in favour of the said Mrau Soni—

A certain piece of freehold land, in extent fifty-nine (59) acres more or less situate and being Subdivision G of Lot No. 9, Umgoti No. 4853, Ixopo Division, County of Pietermaritzburg, Province of Natal, as will more fully appear on reference to the Deed of Transfer No. 5003/1924, in favour of Leslie William Fynn, dated the 4th December, 1924, and diagram annexed thereto.

Defendant is to pay the costs of this suit."

For Appellant: Adv. D. L. Shearer, instructed by Messrs. Raulstone & Co., Pietermaritzburg.

For Respondent: Adv. B. D. Burne, instructed by Messrs. Bulcock, of Ixopo.

Cases referred to:—

Sechabela *v.* Mahlafuna, 1944, N.A.C. (T. & N.), 64.
Kekana *v.* Kekana, 1945, N.A.C. (T. & N.), 39.
Jajbhay *v.* Cassim, 1939, A.D., 537.
Brandt *v.* Bergstedt, 1917, C.P.D., 344.

Statutes, etc., referred to:—

Section *one hundred and eight* (2) of Natal Code of Native Law.
Sections 2 (*e*) and 4, Government Notice No. 1664 of 1929.
Section *one*, Act No. 12 of 1884 (Natal).

CASE No. 49 OF 1951.

XANJANA MJOLI (Appellant) *v.* **PAULOS KUBONE (Respondent).**

N.A.C. CASE No. 77/51.

PIETERMARITZBURG: Wednesday, 17th October, 1951. Before Steenkamp, President, and Messrs. Balk and Gillbanks, Members of the Court (North-eastern Division).

Native Law and Custom—Lex loci celebrationis *determines formalities of customary union.*

Held: That the *lex loci celebrationis* alone determines the formalities to be complied with in contracting a Native customary union.

Appeal from the Court of the Native Commissioner, Ixopo.

Steenkamp (President), delivering the judgment of the Court:—

Plaintiff's claim is that his late father, Malamba Kubone, married defendant's sister, Masitundwana, who bore the plaintiff two daughters named Nongakanani and Nozindhlela, and other children. Defendant avers that there was no marriage by Native

Law and Custom and that these children are illegitimate, and that he is their guardian, entitled to the lobolo, consisting of fourteen head of cattle which he admits having received.

Defendant's father lived in the Ixopo district and plaintiff's father was domiciled in the Umzimkulu district, East Griqualand.

If the Natal Code is applied, then there was no union, but if we apply the Native Law and Custom as followed in East Griqualand, then there was a customary union.

It is common cause that no official witness was present as provided for in section 59 (1) (*c*) of the Code.

The Native Commissioner found proved that Malamba and Masitundwana were married in the Cape Province according to Native Law and Custom. While we agree with this finding, it is necessary to go into the question more fully.

At the time of the alleged union, plaintiff's father was domiciled outside Natal, and while negotiations for the customary union took place at the kraal of the bride's father, it does not follow that the actual wedding ceremony took place there. In fact, according to Native Custom, the determining moment of the marriage is when the bride arrives at the kraal of her future husband. Krige on page 138 of the *Social System of the Zulus* states—

> "on the arrival of the bride at the bridegroom's kraal, the marriage celebrations can be said to begin."

Bryant in *The Zulu People* on page 544, states:—

> "For every Zulu girl the going forth to marriage was a very mixed joy; for the first, and final, parting from her mother—who, with her father, for the sake of their own and daughter's feelings, never personally attended their daughter's wedding, but always remained quietly and alone at home—was without any doubt one of the saddest experiences in a girl's life."

He goes on and states on page 545:—

> "As they (the bridal party) drew near the bridegroom's kraal they formed themselves into a compact group . . ."

There is a difference of opinion as to whether the bride's parents attend the wedding. Krige in his book deals with this. It seems to us that it is a matter of choice and in some districts the parents do not attend, whereas in other parts, they do. Whitfield (2nd Edition) on page 88 states:—

> "The third essential of a customary union is the transfer of the woman from her father's group to that of her husband. This usually takes place at the kraal of the bridegroom where she is initiated into her new home by the ritual killing of an animal for the bride, who, by partaking of it is introduced to the food of the family, or, as stated by the bridegroom, 'is being fed with the milk of her new home'."

The other two essentials are—

(1) the consent of the contracting parties;
(2) the delivery and acceptance of the lobolo cattle.

After having consulted these authorities on the social customs of the Zulus we are satisfied that the wedding actually takes place at the bridegroom's residence. This subject is dealt with by Cheshire in his *Private International Law* on page 240 *et seq* and he concludes and states:—

> "So imperative is it that the *lex loci celebrationis* should alone determine whether the formalities of a marriage are sufficient, that no exception is made to the principle even where the sole object of the parties in marrying in a foreign country has been to evade some troublesome requirement of their *lex domicilii*."

In the present case the provisions of section 59 (1) (*a*) of the Natal Code of Native Law were complied with, those of sub-section (1) (*b*) of that section do not apply as the bridegroom was not a minor, and those of sub-section (1) (*c*) thereof were not observed, but this is immaterial as they are inapplicable since the union took place outside Natal where the essentials are as indicated by Whitfield (already referred to).

In so far as the facts are concerned, the Native Commissioner has found proved, in a very able judgment, which is fully supported by the evidence, that a union according to Native Law and Custom took place. It follows that this Court cannot properly hold that the Native Commissioner has come to the wrong conclusion.

The appeal is dismissed with costs.

For Appellant: Adv. D. L. Shearer, instructed by Messrs. Raulstone & Co., Pietermaritzburg.

For Respondent: Adv. B. D. Burne, instructed by Mr. H. L. Bulcock, of Ixopo.

Statutes, etc., referred to:—

Section 59 (1) (*a*), (*b*) and (*c*) of the Natal Code of Native Law.

CASE No. 50 OF 1951.

HERMAN GCWABE (Appellant) *v.* DINAH NKOSI (Respondent).

N.A.C. CASE No. 78/51.

PIETERMARITZBURG: Wednesday, 17th October, 1951. Before Steenkamp, President, and Messrs. Balk and Gillbanks, Members of the Court (North-eastern Division).

Practice and Procedure—Application for condonation of late noting of appeal—Unreasonable delay—No reasonable prospects of success on merits.

Native Law and Custom—Constructive delivery of lobolo cattle—Novation.

Held: That applicant had delayed in noting the appeal to such an extent that this Court was entitled to assume that he had acquiesced in the judgment and did not think it worth while proceeding with his intention to appeal.

Held further: That unreasonable delay in noting an appeal postulates acquiescence in the judgment.

Held further: That in view of the novation, applicant had, in the particular circumstances of this case, no prospect of success on appeal and that his application for condonation of the late noting should therefore be refused.

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

Steenkamp (President), delivering the judgment of the Court:—

In the Native Commissioner's Court plaintiff sued the defendant (now appellant) for the physical delivery of nine head of cattle or their value £45, being balance of lobolo due to the estate of

the late Joseph Nkosi, in respect of the marriage of the defendant to the second daughter of the late Joseph Nkosi in or about the year 1932.

Plaintiff describes herself as "an exempted woman, in her capacity as duly authorised representative of the estate of the late Joseph Nkosi, acting under letters of administration dated the 10th February, 1950, and issued to her by the Native Commissioner, Pietermaritzburg."

Both parties were legally represented in the Court below. Defendant's written plea reads as follows:—

"(1) Defendant admits that he married Alvina Nkosi, daughter of Joseph Nkosi during 1932.

(2) Defendant avers that the full lobola was paid in respect of his said marriage namely 10 head of cattle and the Nqutu beast. Defendant alleges that nine head of cattle were paid on hoof and the 10th beast and Nqutu beast were paid in cash.

(3) Defendant denies being indebted to the plaintiff in the amount claimed or any amount."

Plaintiff, after receipt of the plea, requested defendant to furnish further particulars to the plea and asked the following question:—

"To whom were the nine head of cattle and the 10th beast and Nqutu in cash paid. How much was paid in cash in respect of the 10th beast and Nqutu?"

Defendant's reply was:—

"Nine head of cattle were paid to plaintiff's father and £5 in cash was also paid to plaintiff's father. £6 was paid to plaintiff's mother for Ngqutu beast. All payments were made by Defendant's father."

The Native Commissioner entered judgment for plaintiff for nine head of cattle or value £45 and costs on the 22nd January, 1951. Against this judgment an appeal was noted by defendant's attorney (not the attorney who appeared on his behalf in the Court below) on the 23rd May, 1951, on the following grounds:—

(1) That the judgment was contrary to law and the evidence.

(2) That on the pleadings and evidence the learned Acting Additional Native Commissioner should have found that the defendant in terms of section *forty-seven* (1) and (2) of Proclamation No. 168 of 1932 had discharged his liability to plaintiff on acceptance by plaintiff's agent of nine head of cattle delivered to plaintiff at the kraal of Makatini so far back as the year 1932.

(3) That evidence of a subsequent agreement denied by defendant to pay other cattle in the place and instead of the cattle originally paid by him, should not have been accepted and was irrelevant to the claim before the Court without amendment of the summons and claim as a novation of the original transaction between the parties.

(4) That any right of action by plaintiff should have been against Makatini, who was the possessor on behalf of the plaintiff who had accepted him as such, and the claim should not have been made against defendant.

Application is made to this Court for the condonation of the late noting.

Applicant (appellant) in his supporting affidavit states that on the 26th January, 1951, i.e. a few days after judgment, he instructed his attorneys to note an appeal. He paid them £6 on account of fees and they undertook this mandate. On the 15th February, 1951, he received a letter from them declining to

prosecute the appeal. It was then too late for the noting of the appeal. Applicant waited until the 23rd May, 1951, before he caused another firm of attorneys to act on his behalf. No reason is given for the delay of over three months from the time the first firm of attorneys intimated that they would not act until the time another attorney noted the appeal. The applicant has delayed the matter to such an extent that this Court is entitled to assume that he acquiesced in the judgment and did not think it worth while to proceed with his intention to appeal.

Although defendant in his plea and further particulars supplied, states that he paid the lobolo to plaintiff's father, i.e. the late Joseph Nkosi, he does not, in evidence, confirm this. On the contrary, according to the evidence adduced on behalf of plaintiff, a man by the name of Hlekwa, a friend of the late Joseph Nkosi, was appointed by the deceased to give consent to the marriage of his daughters and also to take delivery of the cattle for the purpose of handing them over to the mother of the daughters.

Plaintiff's case is that when her sister, Alvina, got married, defendant pointed out nine head of cattle at Makatini's kraal as lobolo. Makatini had married defendant's sister and these were the cattle that were due to be paid to defendant, but instead of removing them to his kraal, he pointed them out to Hlekwa as the lobolo for Alvina. This evidence is confirmed by defendant, but according to plaintiff, when they wanted to remove the cattle from Makatini, defendant's sister had left Makatini, who then claimed the cattle as a forfeit. Defendant was informed of this, whereupon he told plaintiff to leave the cattle and he would buy others to replace those at Makatini's. Defendant denies this, but the evidence is so overwhelmingly in favour of plaintiff that the Native Commissioner quite correctly found that the original contract was novated, defendant promising to pay other lobolo in lieu of the nine head of cattle at Makatini's. Once this Court is satisfied that the debt had been novated, then the defendant is liable to discharge the debt he had created by his act of novation. We agree that when defendant pointed out the cattle at Makatini's, there was constructive delivery to plaintiff, and if not paid, plaintiff had a claim against Makatini. They naturally approached defendant first before taking action, and when he promised to replace the cattle, he entered into a new contract and he is liable thereunder.

Counsel for applicant argued that plaintiff's claim is in respect of delivery of the original lobolo cattle pointed out and nowhere is it stated in the claim that the lobolo cattle were novated for other cattle. This argument is of a technical nature and we are not prepared to entertain it in the absence of substantial prejudice to the defendant. It does not seem to make much difference whether plaintiff claims the original cattle pointed out or whether he claims those promised by defendant to replace the cattle which he had to return to the person from whom he had received them.

Defendant cannot succeed on the evidence or on the grounds of appeal noted. and no good purpose would be served by condoning the late noting.

The application is dismissed with costs.

For Appellant: Adv. J. Hershensohnn, of Pietermaritzburg.

For Respondent: Adv. J. J. Boshoff, instructed by Messrs. McGillewie & Co., Pietermaritzburg.

Statutes, etc., referred to:—

Section *forty-seven* (1) and (2) of Proclamation No. 168 of 1932.

CASE No. 51 OF 1951.

MAFILIKA NGCOBO (Appellant) *v.* **MCATEKELI MKIZE (Respondent).**

N.A.C. CASE No. 91/51.

PIETERMARITZBURG: Thursday, 18th October, 1951. Before Steenkamp, President, and Messrs. Balk and Gillbanks, Members of the Court (North-eastern Division).

Native Law and Custom—Accounting for loss of "sisa" stock.

Held: That the "sisa" holder, to be absolved from liability for any losses of "sisa" stock, must report such losses immediately to the owner, and where any "sisa" animal has died, the former must, in addition, produce its skin to the latter or furnish other concrete proof of its death.

Held further: That in the absence of the "sisa" holder, these duties devolve on the "eye" of the kraal and that if the latter fails to carry out such duties, the "sisa" holder is liable.

Held further: That the onus rests on the "sisa" holder to satisfy the Court that he has properly accounted for losses of "sisa" stock.

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

Steenkamp (President), delivering the judgment of the Court:—

In the Chief's Court the plaintiff, now respondent, sued the defendant for refund of seven head of cattle paid as lobolo for defendant's daughter who had jilted him. The defendant's reply before the Chief was an admission of liability for three head of cattle only in view of the fact that four had died. The Chief entered judgment for plaintiff for three head of cattle and costs. The plaintiff was not satisfied with this award and lodged an appeal with the Native Commissioner who upheld the appeal with costs and altered the Chief's judgment to one for plaintiff for refund of ten goats or one beast or value £5, two beasts or value £18, one beast or value £10, and £15 cash and costs.

Against that judgment an appeal has been noted to this Court on the following grounds:—

(1) That the judgment is wrong in law and against the weight of evidence led.

(2) That the learned Native Commissioner misdirected himself in not requiring more substantial proof by plaintiff in view of plaintiff's delay in the bringing of his action, especially in view of defendant's and his witnesses's evidence.

Counsel for appellant has, however, confined his arguments to ground (2).

From the record it appears that when defendant's daughter became engaged to the plaintiff's son, plaintiff did not have sufficient cattle to pay the lobolo demanded but he paid to the defendant cash on the understanding that the defendant would purchase the necessary cattle and two horses which he specially required or needed. The cattle and two horses were purchased and although the plaintiff paid to the defendant £18 to enable him to purchase the two horses, the evidence is that the defendant paid £20 for these animals. This is immaterial as the fact remains that two horses were purchased and even if defendant

paid for the horses more than the money he received from plaintiff, that was his concern, as one can quite understand that at that time nobody anticipated that the marriage would not take place and as defendant specially needed horses, he evidently did not care whether he paid £18 or £20 for them, but one point stands out clearly and that is that it was the intention of the parties that the dominium in the horses and cattle purchased should vest in the plaintiff until such time as the marriage actually took place.

In the lobolo agreed upon the plaintiff railed to the defendant ten goats and there can be no question that these ten goats arrived at the kraal of the defendant. Defendant states he was not present at the time, and that the ten goats disappeared soon after. He states that a report was made to the Police but this is not confirmed and in fact he admits that he could not make a written statement to the Police as he was unable to give a description of the goats. He was the person in control of those goats and therefore it became his duty immediately to make a report to the authorities that the goats had been stolen. He did not timeously report to the plaintiff that the goats had disappeared and from the evidence it seems to us that it was only an afterthought on the part of defendant to testify in the Court below that he had reported to the Police or that he had made a report to the plaintiff. One would expect that when a person is in control of stock, whether they belong to him or not, and especially in this case, as the goats would eventually, if a marriage had taken place, become his property, he would immediately have made a report to the Police. Even if defendant was not at home, it was the duty of the "eye" of the kraal to have made a report and the plaintiff cannot be blamed for any negligence or neglect of duty on the part of the person who was in charge of defendant's kraal at the time.

We are therefore satisfied that as no timeous report had been made to the plaintiff and the Police by the defendant, he is liable to refund the value of those goats to the plaintiff.

Coming to the one beast defendant alleges died, and which he states he reported to the plaintiff, it is admitted by him that he did not take the skin to the plaintiff. In the case of Mpanza *v.* Shezi, 1, N.A.C. (N.E.), 169, in which previous decisions on the question of the loss of sisa cattle are collated, it was laid down that it is the duty of the sisa holder to take the skin to the owner of the beast. Defendant in this case admits he has not done so and therefore he is liable.

Regarding the two horses, defendant gives evidence and is supported by one witness that the one horse was killed by lightning and that the other died from horse-sickness. Also in this case no hides were taken to the plaintiff and defendant states it is not usual for horses to be skinned. This might be so in ordinary cases but when we deal with sisa stock, Native Custom makes no difference between cattle, sheep or horses, and we see no reason why, for the purpose of protecting himself, the sisa holder should not skin the horse and take the skin, or some other concrete proof, to the plaintiff. We know that when an animal is killed by lightning that Natives are very reluctant to skin that animal, but if that is the case then we see no reason why the defendant could not have sent a message to the plaintiff to come and see the dead horse. We cannot make exceptions where the law is clear that the acceptable evidence of death is the skin, unless there is other concrete proof, as this will only lead to many subterfuges.

Counsel for appellant has argued at length on the question of how the various cattle and horses were acquired, but we are not concerned with that as the fact stands out clearly that at

one time defendant was in possession of the stock claimed by the plaintiff, and there is an onus on him to satisfy this Court that his liability to refund these animals has been liquidated. He has not done so and therefore the appeal must fail.

It is accordingly ordered that the appeal be and is hereby dismissed with costs.

For Appellant: Adv. A. O. Croft-Lever, instructed by Messrs. McGillewie & Co., Pietermaritzburg.

For Respondent: Adv. J. H. Niehaus, instructed by Messrs. Raulstone & Co., Pietermaritzburg.

Cases referred to:—

Mpanza *v.* Shezi, 1, N.A.C. (N.E.), 169.

CASE No. 52 OF 1951.

MJABULISENI MTEMBU (Appellant) *v.* MPIYONKE MTEMBU (Respondent).

N.A.C. CASE No. 96/51.

ESHOWE: Wednesday, 24th October, 1951. Before Steenkamp, President, and Messrs. Balk and Oftebro, Members of the Court (North-eastern Division).

Native Law and Custom—Liability for return of loan of lobolo cattle.

Held: That defendant was not responsible for the repayment of the loan of lobolo cattle in that—

(*a*) it was clear from the evidence that in arranging this loan, defendant had acted as the disclosed agent of his younger brother whom he had merely assisted in negotiations and that the understanding was that that loan was to be repaid by means of the lobolo paid for the first daughter of the younger brother's customary union;

(*b*) the defendant had given no undertaking to repay the said loan.

Held further: That in any event the action had, in the particular circumstances of this case, been brought prematurely.

Appeal from the Court of the Native Commissioner, Empangeni.

Balk (Permanent Member), delivering the judgment of the Court:—

This is an appeal against the judgment of a Native Commissioner's Court reversing on appeal the judgment of a Native Chief's Court for plaintiff (present appellant) for eight head of cattle and costs.

It is common cause that the eight head of cattle in question were borrowed from the plaintiff for the purpose of paying part of the lobolo in respect of a customary union to be contracted by the defendant's younger brother, Sende.

It is clear from the plaintiff's evidence and that of his mother, that in arranging this loan the defendant acted as the disclosed agent of Sende and that the understanding was that it was to be repaid by means of the lobolo of the first daughter of the said union, which is in accordance with Native Custom, *vide* Mcunu *v.* Mcunu, 1946, N.A.C. (T. & N.), 48. It is also clear from the plaintiff's evidence that the defendant gave no undertaking to repay the loan in question.

Appellant's counsel contended that the defendant had, in negotiating the loan in question acted as co-principal, but we cannot agree with this contention as it is clear from the evidence that the defendant in his capacity as the elder brother of Sende had merely assisted the latter in those negotiations.

It follows that the defendant is not responsible for its repayment.

The plaintiff states in his evidence that he brought the action as Sende's wife had no children for five years, and thereafter deserted Sende, but he does not aver that they have been divorced, nor that it is impossible for her to have children, so that in any event the action has been brought prematurely.

The appeal is dismissed with costs.

For Appellant: Mr. H. H. Kent, of Eshowe.

For Respondent: Mr. G. D. E. Davidson, of Empangeni.

Cases referred to:—

Mcunu *v.* Mcunu, 1946, N.A.C. (T. & N.), 48.

CASE No. 53 OF 1951.

FRANCIS NYAWO (Appellant) *v.* **NDODA NYAWO & ANOTHER (Respondents).**

N.A.C. CASE No. 102/51.

ESHOWE: Wednesday, 24th October, 1951. Before Steenkamp, President, and Messrs. Balk and Oftebro, Members of the Court (North-eastern Division).

Native Law and Custom—Succession—Estate of Chief—House property—Constitution of "Indhlunkulu"—Allocation or donation of kraal property to one of his houses—"Ilawu" has no status.

Held: That in the absence of evidence of a public or formal declaration by the deceased kraal head (a Chief) that a certain kraal formed his Indhlunkulu, such kraal could not, in the circumstances of this case, be regarded as having been constituted a "house".

Held further: That the mere establishment of the kraal in question did not in itself, in the absence of proof that it constituted the deceased's Indhlunkulu, as contended by plaintiff, confer any right on the latter to that kraal and even if it were conceded that plaintiff's mother was the chief wife of the said kraal, this did not entitle the plaintiff to inherit it any more than the eldest son of the chief wife of any of the other of deceased's kraals, unless the said kraal was the Indhlunkulu.

Held further: That clear proof is required to substantiate an allocation or donation by the deceased kraal head of his kraal property to one of his houses.

Held further: That in Native Law and Custom the important houses are only the "Indhlunkulu", "Iqadi" and "Ikohlo", and that an "Ilawu" hut carries no status whatsoever and can never, under any circumstances, acquire and own property, since it never has any woman living permanently in it.

Appeal from the Court of the Native Commissioner, Ingwavuma.

Oftebro (Member):—

I have read my brother Balk's judgment and I agree that the appeal should be dismissed with costs.

From plaintiff's own case it is abundantly clear that the mother of second defendant was declared chief wife of the late Chief Mtshakela and that her son, the second defendant, has been appointed his general heir and chief of the tribe.

That being so, plaintiff's mother merely ranks as an ordinary wife and her son is entitled only to her house property which, it is common cause, has been received in a judgment against one Mavela—see page 28, line 24 of the evidence.

I can only regard this further claim as spurious and based entirely upon a misconception or corruption of Native Law and Custom.

The record bristles with such terms as the "Olakeni *House*", the "Ilawu *Kraal*", etc., all of which are foreign to Native Law and Custom.

In Native Law and Custom the important *houses* are only the "Indhlunkulu", "Iqadi" and "Ikohlo".

An "Ilawu" hut is found in every kraal of substance and is the hut used by the kraal head as his sleeping hut and where he is visited by his wives in turn. This hut carries no status whatsoever and can never, under any circumstances, acquire and own property, since it never has any woman living permanently in it. It is immaterial whether the "Ilawu" is a hut or a square building.

It seems perfectly clear from plaintiff's own evidence that he still claims to be the general heir to the late Chief Mtshakela, and that issue has already been decided in favour of second defendant.

Plaintiff was the last person to give evidence on his own behalf, and he claims that the late Chief Mtshakela divided his estate into the Indhlunkulu, Ikohlo and Iqadi sections. None of the other witnesses make any mention of this, and it is certainly not consistent with his summons.

Balk (Permanent Member):—

The plaintiff (present appellant) sued the two defendants (present respondents) jointly and severally in the Native Commissioner's Court at Ingwavuma for one hundred and thirty-three head of cattle, later amended to two hundred and eleven head, or their value calculated at £10 per head, averring that these cattle were the property of the house of the late Chief Mtshakela Nyawo, of which he was the heir, and that the defendants had unlawfully taken them.

The defendants in their plea denied the plaintiff's averment and the presiding Assistant Native Commissioner at the conclusion of the trial entered judgment for defendants with costs.

The appeal resolves itself in the main to one on fact, the detailed grounds thereof reading as follows:—

"(1) That the judgment is against the weight of evidence.

(2) That in view of the fact that appellant (plaintiff) proved that he is the eldest surviving son of Martha Ndhlangamandhla, he is entitled to succeed to all the assets found in Martha's house, namely the Olakeni kraal.

(3) That the Court erred in finding that the house of Martha did not exist in that appellant proved that his mother, Martha, was third married wife and that a house was established for her and that the said Martha was made the chief wife of the said Olakeni kraal.

(4) That appellant proved that at the death of the late Chief Mtshakela there were assets belonging to the Olakeni kraal and therefore judgment should have been in appellant's favour as claimed.

(5) That the Court erred in finding that the Olakeni kraal was not a properly constituted house and that Martha was not the chief wife of the said Olakeni kraal.

(6) That the Court erred in finding that the late Chief Mtshakela did not apportion cattle to the Olakeni kraal.

(7) That in fact plaintiff proved that cattle were placed in the Olakeni kraal.

(8) That in any event plaintiff is entitled to all the cattle found in or belonging to the Olakeni house after the death of the late Chief Mtshakela."

It is common cause that—

(1) the plaintiff is the second eldest son of the late Chief Mtshakela Nyawo (hereinafter referred to as "the deceased") by his customary union with Martha Ndhlangamandhla;

(2) the eldest son of that union, Daniel, died unmarried during childhood;

(3) the second defendant succeeded to the Chieftainship rendered vacant by the demise of the deceased and as such is in possession of the latter's assets;

(4) the first defendant was appointed guardian over all the deceased's assets after the latter's death in the year 1936 and continued as such until the second defendant assumed the chieftainship in question;

(5) the deceased was born at the Shiyabanye kraal, which had been the Indhlunkulu of his late father, Sambane, whom he succeeded;

(6) the deceased resided at that kraal for some time, during which period the second defendant and the late Daniel were born there, and he eventually moved to Olakeni, where he lived for some time, and died;

(7) the deceased established the Makoba, Empandhleni and Olakeni kraals.

The evidence for plaintiff is to the effect that his mother, Martha, was the chief wife of the Olakeni kraal, which formed the deceased's Indhlunkulu section, and as such she was the Indhlunkulu wife of the deceased, but there is no evidence whatsoever that the deceased at any time made a public or formal declaration in regard to which of his establishments formed the Indhlunkulu. On the contrary the evidence as a whole establishes that after the deceased's death, the question of which of his establishments formed the Indhlunkulu was in obscurity. That this is so is manifest from—

(*a*) the evidence of the plaintiff's mother, Martha: "I deny saying in the case in 1949 that Estella (also referred to in the evidence as Esther, the mother of the second defendant) was the great wife of Mtshakela (the deceased). I said that he was the chief wife appointed by the tribe after his death. I said that I was the third wife. Estella's eldest son is Mbabane, Defendant No. 2. Mbabane has been elected chief to the Nyawo tribe.";

(*b*) the evidence of the first defendant: "when Mtshakela (the deceased) died, his brothers and elders met to decide his burial place. A tribal meeting was held to decide the heir and the decision fell on Esther's eldest son." And further to the effect that the deceased had appointed no Indhlunkulu;

(*c*) the evidence of the plaintiff's second witness, Abel Nyawo: "I do not know that Mbabane, Defendant No. 2, was the heir. I know it to-day because he is the Chief.";

(*d*) the fact that the plaintiff sought to establish that his mother, Martha, was the deceased's Indhlunkulu wife by means of indirect evidence, viz., that he (plaintiff) had stabbed the grave site of the deceased with an assegai; that his (plaintiff's) mother had carried the magazine rifle in the funeral

procession at the deceased's burial; that the deceased when dying had given his (plaintiff's) mother the stick presented to him (the deceased) by the Prince of Wales.

That the question as to which of a deceased's establishments in Zululand formed his Indhlunkulu may well be obscure after his death, as in the present instance, is borne out by the relevant portion of the judgment by *Jackson, J.,* in Ntukwini *v.* Miso, 1917, N.H.C. at page 228, which received approval in the judgment of the Appellate Division of the Supreme Court in that case, *vide* page 242.

The evidence for the defendants was that Olakeni constituted an "ilawu" (a private building of ease for the deceased) and that it consisted of a square brick building erected by the deceased with contributions from his whole tribe; but it is clear from the evidence as a whole that Olakeni formed one of the deceased's kraals. The defendants' witnesses deny that the plaintiff stabbed the deceased's grave site and state that this was done by the first defendant on behalf of the second defendant who was away at school at the time; further that the plaintiff did not attend the deceased's funeral as he was then a child below the age of puberty and that it is contrary to custom for children to attend burials. As regards the stick, the evidence for the defendants is that the stick of importance, viz., the "Inkata-ndugu" which is the symbol of the chieftainship in question, was given to the second defendant's mother, Esther, and was kept at the Shiyabanye kraal where she lived; further that the late Daniel and Martha's other son, who also died whilst she was at Olakeni, were both buried at the Shiyabanye kraal as also was Martha's sister, who was one of the deceased's wives and lived at Olakeni. Plaintiff and his witnesses admit that Daniel and Martha's other son were buried at Shiyabanye and have not rebutted the evidence for defendants in regard to the burial place of Martha's sister, nor that in regard to the "Inkata-ndugu", so that this evidence stands. The evidence for defendants that the plaintiff had not yet reached the age of puberty when the deceased died and that it is contrary to custom for a child to attend burials has also not been controverted and also therefore stands. The fact that Martha carried the magazine rifle in the procession at the deceased's funeral loses much of its possible significance in the light of the evidence that the second defendant's mother, Esther, was away at the time, having gone to the home of her mother who was ill, and therefore could not attend the deceased's funeral, and regard being had to the fact that, according to the evidence, the dispute in regard to the heirship had already come into being at that time. The burial of Daniel and the plaintiff's other brother as well as Martha's sister at the Shiyabanye kraal, which it is common cause was the ancestral kraal, indicates clearly that the Olakeni kraal was not constituted by the deceased as his Indhlunkulu.

As stated above, there is no evidence whatsoever of a public or formal notification by the deceased, as is customary, that Olakeni formed his Indhlunkulu. The Assistant Native Commissioner in his reasons for judgment states that the witnesses for the defendants were generally more impressive and clear than those for plaintiff. Moreover, it is clear from the foregoing analysis of the evidence, that the probabilities favour the defendants' version and, as pointed out by the Assistant Native Commissioner in his reasons for judgment, the evidence of two of the plaintiff's witnesses on most material points was contradicted by their evidence in the prior cases as is clear from the evidence of the Clerk of the Court, and the relevant evidence in Case No. 2/1950 admitted by consent. It follows that the Assistant Native Commissioner was fully justified in his finding that Olakeni was not constituted a "house" by the deceased.

The mere establishment of the Olakeni kraal does not in itself, in the absence of proof that it constituted the deceased's Indhlunkulu, as contended by the plaintiff, confer any right on him to that kraal and even if it is conceded that the plaintiff's mother was the chief wife of that kraal, this does not entitle the plaintiff to inherit it any more than the eldest son of the chief wife of any of the other of the deceased's kraals unless Olakeni was the Indhlunkulu, which has not been proved, *vide* Ntukwini's case (supra) at page 237.

The evidence for the plaintiff is also to the effect that the cattle in question had been allocated or donated by the deceased to Martha's house. It is clear from the evidence, however, that these cattle had been derived by the deceased from fines and such other sources as make it obvious that they constituted his kraal property and not the property of any of the houses resulting from his several customary unions. The evidence for the plaintiff that the cattle concerned had been allocated or donated by the deceased to Martha's house is vague and there is no evidence that the deceased disposed of them in the customary manner, *vide* Mzimela *v.* Mzimela, 1941, N.A.C. (T. & N.), at page 12. The evidence on the contrary tends to indicate that there was no allocation or donation of these cattle by the deceased to Martha's house. This is apparent from the plaintiff's admission that he sued one Mavela in the year 1949 for seventeen head of cattle forming stock his mother, Martha, had brought with her from her home, and their progeny, and from his unconvincing reason for not then suing for the cattle claimed by him in the present action.

As clear proof is required to substantiate an allocation or donation of the nature in question [Butelezi *v.* Butelezi, 1944, N.A.C. (T. & N.), 23], and as the evidence for plaintiff in this respect is vague and there is evidence tending to show that there was no allocation or donation of the stock in question, the Assistant Native Commissioner properly found accordingly.

It must be added that, from the record as a whole, it is difficult to escape the conclusion that the plaintiff, having failed in previous actions in establishing that he was the heir to the deceased's Indhlunkulu section and, as such, his general heir, has, in the present action, cloaked his claim in other guise with a view to securing the stock in question, to which he is not entitled.

In my view the appeal should be dismissed with costs.

Steenkamp (President), delivering the judgment of the Court:—

I concur. It is ordered that the appeal be and is hereby dismissed with costs.

As the record was voluminous and necessitated extensive preparation by Counsel for the parties, the fee for appearance in this Court is increased to £4. 4s.

For Appellant: Mr. H. L. Myburg, of Messrs. Bennett & Myburgh, Vryheid.

For Respondents: Adv. E. P. Fowle, of Messrs. Fowle & Driman, Durban.

Cases referred to:—

Ntukwini *v.* Miso, 1917, N.H.C. 228 and 242.

Mzimela *v.* Mzimela, 1941, N.A.C. (T. & N.), 12.

Butelezi *v.* Butelezi, 1944, N.A.C. (T. & N.), 23.

CASE No. 54 OF 1951.

NKOSANA MAGADLA (Appellant) *v.* EDWARD TSEMANE (Respondent).

N.A.C. CASE No. 69/51.

DURBAN: 29th October, 1951. Before Steenkamp, President, and Messrs. Balk and Lawrence, Members of the Court (North-eastern Division).

Native Law and Custom—Recovery of lobolo on failure of contemplated marriage or customary union.

Held: That the plaintiff is not entitled to recover the lobolo paid by him to defendant for the latter's daughter as his (plaintiff's) failure to implement, without good cause, his undertaking to marry her formed a breach of the marriage agreement and that thus he forfeits the lobolo in question.

Held further: That the position would be the same if the contemplated union were a customary one in the present case, following the relevant Native Custom as practised in the Matatiele District in the Cape Province, which is applicable in this instance.

Appeal from the Court of the Native Commissioner, Pinetown.

Balk (Permanent Member), delivering the judgment of the Court:—

Plaintiff (present appellant) sued defendant (present respondent) in the Native Commissioner's Court at Pinetown for a refund of four head of engagement cattle and £15, representing a further three head of such cattle, on the ground that defendant's daughter, Lettie, in respect of whom these payments had been made by him, nad jilted him.

Defendant pleaded that he was not indebted and the Presiding Assistant Native Commissioner, at the conclusion of the trial, found that the cattle and money concerned had in fact been paid by the plaintiff to the defendant as damages for the abduction and seduction of Lettie, as averred by the defence witnesses in their evidence, and entered judgment for defendant with costs.

The appeal is on the following grounds:—

"1. The judgment is against the evidence and the weight of evidence.

2. The delivery of four head of cattle and £15 having been admitted the Native Commissioner should have held that these deliveries represented lobolo repayable when the girl jilted the plaintiff.

3. In any event judgment should have been given in favour of the plaintiff for £5 admitted by the defendant to be owing by him to the plaintiff."

It is common cause that—

(1) the plaintiff abducted and seduced Lettie in the year 1937;
(2) she lived with him thereafter for a period of 13 years;
(3) the lobolo agreed upon for her was twenty-five head of cattle;
(4) the plaintiff actually paid the defendant only the four head of cattle and £15, which form the subject matter of his claim; and
(5) that the plaintiff did not marry Lettie.

It is averred in the evidence for plaintiff that a further seven head of cattle were pointed out at the plaintiff's kraal to the defendant's son, Petros, as lobolo for Lettie and that these cattle

were marked by Petros. This is denied by the latter in his evidence wherein he also stated that only one further such beast was pointed out to him. The Assistant Native Commissioner states in his judgment that he accepted the evidence of Petros and rejected that of the plaintiff in this respect; as he has given sound reasons for so doing and good cause has not been shown, nor does anything suggest itself to indicate that his finding was wrong, this Court is not prepared to differ from him.

According to the plaintiff's evidence it was arranged that the marriage between him and Lettie should be by Christian rites. It is clear from the evidence as a whole that during the thirteen years that she lived with him he made no serious attempt to find the lobolo agreed upon for her, viz., twenty-five head of cattle; that during that period he took no proper steps to marry her as arranged, and that she eventually left him because she grew tired of waiting for him to marry her. The plaintiff's reason for his long delay, viz., that he could not trace her father, is on the evidence as a whole, unconvincing and unacceptable, and the Assistant Native Commissioner therefore properly found, as stated in his reasons for judgment, that " if plaintiff made the least effort to trace defendant, he would have succeeded ".

It follows that in these circumstances Lettie was justified in leaving the plaintiff and returning to her father, as the plaintiff's conduct was clearly tantamount to a failure by him, without good cause, to implement his promise to marry her, and therefore amounted to an unjustified rejection.

According to the evidence of the defendant, whom the Assistant Native Commissioner believed, and properly so in my opinion, the four head of cattle and £10 were paid by the plaintiff to the defendant as damages for Lettie's abduction and seduction, and the balance of £5 as part lobolo for her. The plaintiff is, however, not entitled to recover this £5 as his failure to implement his undertaking to marry Lettie formed a breach of the marriage agreement, and thus he forfeits the lobolo in question, *vide* Ngcobo *v.* Msululu, 2, N.A.C. 33 (Transkei), and September *v.* Mpolase, 1937, N.A.C. (C. & O.) 138.

The defendant in his evidence stated that the union contemplated between the plaintiff and Lettie was a customary one. Assuming this to be the case, the result would be the same, since it is clear from what has been stated above that the plaintiff was responsible for the failure of the contemplated union in circumstances amounting to a rejection without good cause; and according to the relevant Native Custom as practised in the Matatiele District in the Cape Province, where the parties are domiciled and the engagement took place, and which custom, according to the evidence, they follow, the plaintiff in the circumstances forfeits all of the payments in question effected by him to the defendant, *vide* Kesa *v.* Ndaba, 1935, N.A.C. (C. & O.) 64.

It follows that, viewed from either angle, the plaintiff cannot succeed in his claim.

In my view the appeal should be dismissed with costs.

Steenkamp (President): I concur.

Lawrence (Member): I concur.

For Appellant: Mr. Darby of Messrs. Darby & Higgs of Durban.

For Respondent: Mr. le Marchand of Messrs. Willcocks & le Marchand, Pinetown.

Cases referred to:—

Ngcobo *v.* Msululu, 2, N.A.C. 33 (Transkei).

September *v.* Mpolase, 1937, N.A.C. (C. & O.) 138.

Kesa *v.* Ndaba, 1935, N.A.C. (C. & O.) 64.

CASE No. 55 OF 1951.

FANYANA NTUSI (Appellant) *v.* **NDABEZITA MQADI (Respondent).**

N.A.C. CASE No. 75/51.

DURBAN: 29th October, 1951. Before Steenkamp, President, and Messrs. Balk and Lawrence, Members of the Court (North-eastern Division).

Practice and Procedure—Appeal from Chief's Court—Section twelve (4) *of Native Administration Act,* 1927 (*Act No.* 38/1927)—*Designation of parties.*

Held: That an Assistant Native Commissioner has no jurisdiction to hear an appeal from a Chief's Court.

Addendum: The proper designation of the parties to such an appeal in the Native Commissioner's Court is "plaintiff" and "defendant" and not "appellant" and "respondent".

Appeal from the Court of the Native Commissioner, Port Shepstone.

Steenkamp (President), delivering the judgment of the Court:—

It is observed from the record that the Assistant Native Commissioner of Port Shepstone heard an appeal from a Chief's Court. He had no power or jurisdiction to hear the appeal as, according to section *twelve* (4) of Act No. 38 of 1927, as amended, no Assistant Native Commissioner shall hear an appeal from a Chief's judgment unless no Native Commissioner has any judicial jurisdiction in the said area; and in terms of section *two* (2) of that Act, the Minister may only appoint an Assistant Native Commissioner for an area in respect of which he has appointed a Native Commissioner.

A Native Commissioner's Court was established for the Port Shepstone Magisterial District by Proclamation No. 298 of 1928.

The proceedings before the Assistant Native Commissioner are therefore *void ab origine* and this Court orders as follows:—

> "The proceedings before the Assistant Native Commissioner are set aside. The appeal must be heard by the Native Commissioner. No order as to costs in the Court below or in this Court."

Rider:

This Court is constrained to remark once more that a presiding officer has seen fit to designate the parties as "appellant" and "respondent" in a case heard by him on appeal from a Chief's Court. This designation is confusing when the case comes on appeal before this Court. The designation should be "plaintiff" or "defendant" as the case may be.

Balk (Permanent Member): I concur.

Lawrence (Member): I concur.

For Appellant: Adv. R. W. Cowley, instructed by Messrs. Cowley & Cowley, Durban.

For Respondent: Mr. R. I. Darby, instructed by Messrs. Forder, Ritch & Eriksson, Port Shepstone.

Statutes referred to:—

Sections *two* (2) and *twelve* (4) of Act No. 38 of 1927.

CASE No. 56 OF 1951.

JACKSON S. NZIMANDE (Appellant) *v.* **VINCENT PHUNGULA (Respondent).**

N.A.C. CASE No. 86/51.

DURBAN: 29th October, 1951. Before Steenkamp, President; and Messrs. Balk and Lawrence, Members of the Court (North-eastern Division).

Practice and Procedure—Locus standi—*Maintenance of illegitimate children in Natal—System of law to be applied—Recording of decision in this respect.*

Held: That Native Law was properly applied in the present case.

Held further: That under Common Law the father of the mother of an illegitimate child has no *locus standi* to sue in his personal capacity for the maintenance of such child, the mother being the proper person to bring the action.

Held further: That in Native Law as it obtains in Natal the father of the mother of an illegitimate child has the capacity to bring an action on its behalf.

Held further: That the system of law applied dictates the capacities of the parties in the present action.

Held further: That in Native Law as it obtains in Natal the natural father of an illegitimate child is not under a legal obligation to maintain it.

Addendum: Presiding judicial officers in Native Commissioner's Courts are required to record which system of law they have finally decided to apply, and if they have given any provisional indication in that respect, such indication is also required to be recorded.

Appeal from the Court of the Native Commissioner, Durban.

Balk (Permanent Member), delivering the judgment of the Court:—

Plaintiff (present appellant) sued the defendant (present respondent) in the Native Commissioner's Court at Durban for maintenance at the rate of £2. 10s. per month in respect of his (plaintiff's) daughter's illegitimate child, of which the defendant is the natural father.

Defendant admitted liability in his plea but stated that £2. 10s. per month was too high and offered £1 per month.

After the close of the plaintiff's case, the presiding Additional Native Commissioner entered judgment for defendant with costs.

The appeal is brought on the following grounds:—

"(1) The decision is against the weight of evidence and against the law.

(2) The defendant admitted liability and offered one pound (£1) per month.

(3) The defendant is the natural father of the child and liable to contribute to the maintenance of the child.

(4) The amount of £2. 10s. (two pounds ten shillings) per month is a reasonable amount for the defendant to contribute."

Although the Additional Native Commissioner in his reasons for judgment states: "In Native Law there is no right of action against a natural father for the maintenance of his illegitimate child, and the claim falls, therefore, to be dealt with under Common Law", it would appear from the remainder of those reasons that he, in fact, finally applied Native Law in finding for defendant.

It is common cause that the defendant paid the plaintiff the customary damages according to Native Law in respect of the seduction and pregnancy of the plaintiff's daughter before the plaintiff instituted the present proceedings, and that the defendant and the plaintiff's daughter were still lovers at the time when this case was tried.

As the plaintiff observed Native Law in that he accepted the customary damages in respect of his daughter's seduction and pregnancy by the defendant, as well as charge of the illegitimate child concerned, and as the plaintiff has no *locus standi in judicio* to bring an action of the nature in question if Common Law is applied, but has the capacity to do so under Native Law, it would seem that the Additional Native Commissioner properly applied Native Law finally in the present case. It is, however, immaterial which of the two systems of law, i.e. Common Law or Native Law, is applied in this case, since the plaintiff cannot succeed under either system as will be apparent from what follows.

That the plaintiff has no *locus standi in judicio* in this matter if Common Law be applied is clear from the judgment in *ex parte* Minister of Native Affairs in *re* Yako *v.* Beyi, 1948, (1), S.A., 388 (A.D.). In that case the provisions of section *eleven* of the Native Administration Act, 1927, as amended, were interpreted and it was laid down that sub-section (3) of that section has no bearing on the question of what law the Native Commissioner is to apply in the exercise of his discretion under sub-section (1) thereof; further that once the system of law is decided upon, this will determine questions of capacity in relation both to the party in whom the right is or is claimed to be vested, and to the party on whom the obligation rests or is alleged to rest. It follows that if Common Law be applied in the present action, the capacity of the parties would also fall to be determined according to that system of law, and in that event the mother of the illegitimate child, and not such mother's father, would be such child's guardian, and she, and not he, would be the proper person to sue for the child's maintenance, *vide* Mvemve *v.* Mkatshwa, 1950, N.A.C. (N.E.) 284, Case No. 106/50 (report not yet released) and Mokhesi N.O. *v.* Demas, 1951, (2), S.A. 502 (T.P.D.). On the contrary, if Native Law be applied, the illegitimate child concerned belongs to the plaintiff who is its lawful guardian and as such, he has the capacity to sue on its behalf, *vide* Mbuyisa *v.* Mtshali, 1937, N.A.C. (T. & N.) 162, and Tabede *v.* Mlotywa, 1943, N.A.C. (T. & N.) 77.

If the judgment in Marudu *v.* Langa, 1 N.A.C. (N.E.) 106, has been correctly reported, then it would appear that the dictum in Yako's case (supra) that the system of law applied dictates the capacity of the parties, was overlooked.

In Native Law, as it obtains in Natal, however, the natural father of an illegitimate child is not under a legal obligation to maintain it, since it is regarded as the child of the father or guardian of its mother, and the property rights in it are vested in him, *vide* Mbuyisa's case (supra).

The offer of £1 per month made by the defendant when he pleaded, was not accepted by the plaintiff, and thus falls away.

The defendant's admission of liability in his plea is of no legal consequence, seeing that he is under no legal obligation to meet the claim involved if Native Law be applied, and the plaintiff has no *locus standi in judicio* if Common Law be applied.

In support of a proposition that Common Law ought to be applied in all maintenance cases, appellant's counsel quoted Rex *v.* Ngonyama, 1944, N.P.D. 395, wherein it was held that notwithstanding the provisions of the Natal Code of Native Law, making the kraal head liable for the maintenance of illegitimate children and notwithstanding the obligations of the father of such children, contained in section *one hundred and thirty-seven* (1) of that Code, a Native who is the father of the illegitimate child of a Native woman is liable at Common Law to maintain such child and consequently he may be properly charged under section *sixteen* (2) of the Children's Act, 1937. But in that case the matter to be determined was whether or not there had been a contravention of the provisions of a Common Law Statute and there was therefore no room for the cognisance of Native Law. The position is entirely different when, as in the present instance, a civil action for maintenance is brought in a Native Commissioner's Court since, as is clear from what has been stated above, the presiding Native Commissioner is, in such a case, vested with a discretion to apply either the Common Law or Native Law; and it is his duty to exercise that discretion judicially, i.e. as the circumstances of each particular case may dictate on the basis of which system of law it would be fairest to apply in deciding the case between the parties concerned, *vide* Yako's case (supra). It is of interest to note that in Ngonyama's case the learned Judge President added: "But that does not mean that in every case the Children's Act should be relied on. As a matter of administration it seems to me to be highly desirable that cases which occur amongst Natives, living under tribal conditions in the traditional way, should be regarded as covered by the Native Code and that the person liable be prosecuted under that Code.", which is a clear indication that even when it is necessary to resort to criminal proceedings in such matters recourse should, in proper cases in Natal, be had to the relative Native Law provision embodied in the Natal Code of Native Law instead of to the Common Law provision in that respect contained in the Children's Act, 1937.

In the result in my view the appeal should be dismissed with costs.

The Additional Native Commissioner failed to record at the conclusion of the trial of the action in question which system of law he had finally applied. To do so in reasons for judgment given in connection with an appeal, does not suffice. In this connection attention is invited to the following passage in the judgment in Yako's case (supra) at page 397:—

> "I think that he (the Native Commissioner) should only finally decide which system of law he is going to apply after considering all the evidence and arguments as part of his eventual decision on the case; but it would probably be convenient in many cases for him to indicate at an earlier stage, and possibly even at the commencement of the trial, what law he would provisionally regard as applicable."

It must once again be pointed out that presiding judicial officers in Native Commissioner's Courts are required *to record* which system of law they have finally decided to apply and, if they have given any provisional indication in that respect, such indication is also required *to be recorded.* This is a most important aspect of an action, as is evident from numerous judgments of this Court. *The need for these requirements to be strictly complied with can, therefore, not be sufficiently strongly stressed.*

Steenkamp (President): I concur.

Lawrence (Member): I concur.

For Appellant: Mr. R. Mathias, of Messrs. Cowley & Cowley, Durban.

Respondent in person.

Cases referred to:—

Yako *v.* Beyi, 1948 (1), S.A., 388 (A.D.).
Mvemve *v.* Mkatshwa, 1950, N.A.C. (N.E.), 284. Case No. 106/50.
Mbuyisa *v.* Mtshali, 1937, N.A.C. (T. & N.), 162.
Mokhesi N.O. *v.* Demas, 1951 (2), S.A., 502 (T.P.D.).
Tabede *v.* Mlotywa, 1943, N.A.C. (T. & N.), 77.
Marudu *v.* Langa, 1, N.A.C. (N.E.), 106.
Rex *v.* Ngonyama, 1944, N.P.D., 395.

Statutes referred to:—

Section *eleven* of Act No. 38 of 1927.
Section *one hundred and thirty-seven* (1) of Natal Code of Native Law.
Section *sixteen* (2) of Act No. 31 of 1937.

Note by Editor:

In connection with the saving clause "subject to any statutory provision affecting any such capacity of a Native" contained in sub-section (3) of section *eleven* of the Native Administration Act, 1927, as amended, attention is invited to the provisions of section *one hundred and forty-four* (2) of the Natal Code of Native Law published under Proclamation No. 168 of 1932, which provides that nothing in that Code shall be deemed in any way to affect or impair the operation of said section *eleven.*

CASE No. 57 OF 1951.

MPONSWA NGWABE (Appellant) *v.* **GWEMBU MYEZA d.a. (Respondent).**

N.A.C. CASE No. 97/51.

DURBAN: 30th October, 1951. Before Steenkamp, President, and Messrs. Balk and Lawrence. Members of the Court (North-eastern Division).

Native Law and Custom—Damages for alleged assault in the course of a game of football—Application of maxim "volenti non fit injuria"*—Absence of agreement to pay damages.*

Held: That in Natal assault founds an action for damages under Native Law.

Held further: That the injury in question was sustained in the ordinary course of a game of football in which all the contestants voluntarily took part and, as it is clear from the evidence as a whole that this injury was accidental and there is no question of negligence, the maxim *volenti non fit injuria* applies, and the plaintiff cannot recover damages in this instance.

Appeal from the Court of the Native Commissioner, Umbumbulu.

Steenkamp (President), delivering the judgment of the Court:—

In the Chief's Court the plaintiff, now respondent, on behalf of his minor son, sued the defendant, duly assisted by his father, for £9, which amount he claimed as damages for the reason that the defendant had caused an injury to plaintiff's son while they were playing football with a tennis ball.

Defendant's reply to the claim before the Chief is given in one word only, viz: "admitted". The Chief gave judgment in favour of plaintiff and against that judgment an appeal was noted

to the Native Commissioner, who upheld the Chief's judgment. An appeal has now been noted to this Court on the following grounds:—

1. The judgment was against the law, probabilities and the weight of evidence.
2. There was an onus upon the plaintiff to prove that the kicking of his son was intentional, which onus he failed to discharge.
3. The said plaintiff's son by continuing to play thereby consented to taking the risks entailed in playing this game.

The Chief in his reasons for judgment states, *inter alia,* that defendant had agreed before him to pay plaintiff's claim, and that the sum of £10 was at one time offered. The Native Commissioner does not state in the record or in his reasons for judgment whether he tried the case under Native Law and Custom or under Common Law. This Court is constrained to remark that this is one of the essential aspects in each and every case which is being tried by a Native Commissioner. I will, however, in this case, assume, seeing that this is an appeal from the Chief's Court, that the Native Commissioner intended applying Native Law.

In Natal damages for assault *does* found an action under Native Law and Custom and this Court has to decide whether the playing of a game of football in which one of the participants or one of the team was injured, falls under the heading of "assault". There can be no assault if a person willingly participates in a game which is not unlawful.

Plaintiff's son, who received the injuries, states in his evidence that his team objected to defendant taking part in the game, but it seems to us that the objection could not have been seriously made, because notwithstanding the participation by the defendant, the others, including the plaintiff's son, continued playing. Whatever objection they might have had at the commencement of the game was clearly condoned when they continued with the game of football which was played with a tennis ball; and it is clear from the evidence as a whole that the injury was accidental and that there is no question of negligence.

Plaintiff's son's evidence is far from satisfactory and although he stated that there were only three of them playing on his side, his witnesses state that there were about nine or ten on each side. Plaintiff's son also wanted the Court to believe that they were playing in the veld and that stones were erected as goal posts. His witnesses admitted that this was on a football field where there were proper goal posts.

The evidence is overwhelming that this was a game of football in which all the contestants voluntarily took part, and therefore if any member of either team should be injured, the maxim *volenti non fit injuria* is applicable.

The Native Commissioner in his reasons seems to think that unless this was a properly arranged football match, the maxim has no application. This Court cannot agree with this view as a game is a game and can only be removed out of the legal maxim if they played an unlawful game, i.e. a game prohibited by law. I still have to learn that where a number of youngsters get together and play a game usually played by boys, one can deduce that because the game is not played according to rules as prescribed in books of rules, that that game is unlawful.

I wish to revert to the reply given by the defendant before the Chief. The word "admitted" might mean anything and it must be construed in a manner most favourable to the defendant. The word "admitted" can mean, and I am satisfied, does mean, in this case that he admitted that plaintiff's son was injured by him.

It certainly does not follow that he agreed to pay damages because he has, in his evidence, denied this. The Chief does state in his reasons for judgment that the defendant at one time offered to pay £10. It is remarkable that the plaintiff in giving evidence does not mention anything about the defendant having agreed to pay £10. Plaintiff's son, i.e. the one who was injured, however, does state that at the Chief's Court, defendant said he would pay, and that before the case was heard by the Chief, he admitted and said he did not want any case. Here again the Court is faced with the difficulty as to whether defendant admitted he would pay damages or whether he admitted that the injury received by plaintiff's son was caused by him, and has to take into consideration the unreliability of the evidence of plaintiff's son for the reasons given above.

It is settled law that plaintiff cannot recover damages in a case of this nature unless he bases his claim on an agreement subsequently made by the defendant that he would pay the damages. This agreement was not proved, and in any event it is clear from the evidence that the defendant is a minor and appeared without his father in the Chief's Court; therefore the plaintiff cannot succeed on such an alleged undertaking to pay the damages.

If boys will participate in a game of this nature, they run the rick of being injured; there is nothing unlawful in it and I hold that the Native Commissioner has erred in granting damages against the defendant.

In the circumstances the appeal should be allowed with costs and the Native Commissioner's judgment altered to read:—

> "The appeal from the Chief's Court is allowed with costs and the Chief's judgment is altered to one for defendant with costs."

Balk (Permanent Member): I concur.

Lawrence (Member): I concur.

For Appellant: Mr. A. D. G. Clark, of Messrs. Clark & Robbins, Durban.

For Respondent: Mr. G. S. Naidu, of Durban.

CASE No. 58 OF 1951.

JOHNSON MLABA (Appellant) *v.* **AARON CILIZA (Respondent).**

N.A.C. CASE No. 101/51.

DURBAN: 31st October, 1951. Before Steenkamp, President, and Messrs. Balk and Lawrence, Members of the Court (North-eastern Division).

Native Law and Custom—Recovery of lobolo, including Isibizo or fine paid during subsistence of a civil marriage between the payer and a woman other than the one in respect of whom such lobolo, fee or fine was paid—Application of in pari delicto *rule.*

Practice and Procedure—Pleadings—Necessity for evidence to decide the issue.

Held: As regards the first claim, that where a Native already married by civil rites, negotiates for a customary union with a woman other than his wife, he cannot recover the lobolo, isibizo or fine paid by him during the subsistence of such

marriage, in pursuance of those negotiations as public policy does not require a relaxation of the *in pari delicto* rule in such a case.

Held: As regards the second claim, that the Native Commissioner, in the absence of any evidence, was not in a position to decide the issue involved.

Appeal from the Court of the Native Commissioner, Umzinto.

Steenkamp (President), delivering the judgment of the Court:—

In the Native Commissioner's Court the plaintiff, now appellant, sued the defendant, now respondent, firstly for £48 in cash and the return of a saddle or its value, £7. 10s., paid as lobolo for defendant's daughter, Gertrude, by reason of the fact that the marriage did not take place as the said Gertrude jilted the plaintiff, and secondly for the sum of £5. 12s. 6d. being money loaned to defendant.

On the date of the hearing of the case, and after plaintiff had applied for an amendment of the summons, defendant's verbal plea was to the effect that he had received £11 from plaintiff as a fine and "isibizo" and he denied having received the balance of £37. He admitted the receipt of a saddle and although not admitting liability and solely for the sake of peace, offered to return the saddle to plaintiff at defendant's place of residence. On the second claim defendant denied that plaintiff lent him the sum of £5. 12s. 6d., but admitted receiving £5, which was paid to him by plaintiff for the purpose of purchasing wedding clothes for the said Gertrude.

After the pleadings had closed, defendant's attorney applied for judgment, which was granted in favour of defendant with costs.

An appeal has now been noted to this Court on the following grounds:—

(1) The Additional Native Commissioner was wrong in holding that the plaintiff's claim was based on an action to enforce a marriage contract: Defendant's daughter having already married before plaintiff's action was brought.
(2) The Additional Native Commissioner was wrong in that he did not take into consideration that the defendant being *in pari delicto,* was not in law permitted to enrich himself at the expense of the plaintiff.
(3) Whilst acknowledging receipt of the sum of eleven pounds (£11) defendant denied it was lobolo, but was received by him as a fine or isibezo for an apparent seduction, which fact required proof.
(4) It was further admitted that the sum of £5 was given for purchase of wedding clothes, which is not connected with lobolo.
(5) The claim for £5. 12s. 6d. was not in connection with the proposed marriage it was for money lent and it was incompetent for the Additional Native Commissioner to give judgment for defendant in respect of this amount without evidence.
(6) The Additional Native Commissioner should have allowed the cause to go trial.

The Native Commissioner in his reasons based his judgment purely on a question of law in that, as the plaintiff had no right to negotiate for a customary union when he was already married by civil rites, such a contract was *contra bones mores* and the plaintiff could not recover any lobolo he had paid in anticipation of a customary union.

In his argument before the Native Commissioner, the attorney for defendant, when he applied for judgment, advanced the view that in terms of the maxim *in pari delicto potior est condictio defendentis,* plaintiff cannot recover.

Dealing with the grounds of appeal I fail to see how the view can be advanced that the Native Commissioner had held that the claim was based on an action to enforce a marriage contract. The Native Commissioner worded his reasons for judgment rather unhappily, and while he did use the words—"this was an attempt to enforce a marriage contract", this Court holds the view that this was not the case and we are not bound by the reasons given by the presiding officer. It is clear from the claim and the replies that plaintiff sought in his claim a refund for lobolo he had already paid in anticipation of a customary union with Gertrude.

Ground (2) of the notice of appeal can be disposed of by reference to the case of Mncube *v.* Mazibuko, 1941, N.A.C. (T. & N.) 14, and the case of Cele *v.* Soni, 1942, N.A.C. (T. & N.) 78, where the whole question of the maxim *in pari delicto,* was considered in the light of the decision given by the Appellate Division of the Supreme Court in the case of Jajbhay *v.* Cassim, 1939, A.D. 537, and the Court came to the conclusion that where a person already married by civil rites negotiates for a customary union during the subsistence of a civil marriage, he cannot recover the lobolo already paid, and that the enrichment doctrine cannot be applied.

I am not prepared to hold that the previous decisions come to by this Court are wrong, as full weight was given to the decision of the Appellate Division.

Regarding ground (3) I do not think this Court is concerned whether defendant denied or admitted that the amounts he had received from the plaintiff were lobolo. The fact remains that the *plaintiff* claims it was lobolo and as he is out of Court, the payment being made on an illegal contract, he cannot recover, even assuming that the allegations averred in his summons are the truth.

Grounds (4) and (5) deal with the same matter and that is that plaintiff avers he paid £5. 12s. 6d., whereas the defendant averred it was £5. The only question to decide here is whether it was a loan or whether it was paid to defendant to enable him to purchase the wedding outfit for his daughter, and although plaintiff replied to defendant's plea, he at no time admitted that the money was in respect of the wedding outfit, and therefore it must be presumed that this is denied. We now have the position regarding this second claim that plaintiff states it was a loan, whereas defendant states it was in respect of money advanced for the purchase of the wedding outfit. Only after evidence is adduced is the Court in a position to decide whether it was a loan or money advanced for the wedding outfit. The Native Commissioner was therefore not in a position to decide this issue in the absence of evidence, and we agree that ground (6) of the appeal is well taken, but only in respect of the second claim. Consequently the appeal should be allowed in part, and the Native Commissioner's judgment altered to read:—

"Claim (*a*): For defendant with costs."

As regards claim (*b*) the judgment should be set aside and the record returned to enable the Native Commissioner to hear evidence and determine the issues involved, and then to enter a fresh judgment thereon. The appellant should be awarded costs of appeal.

Lawrence (Member): I concur.

Balk (Permanent Member): I agree that the appeal fails in so far as the first claim is concerned, but that the appeal should be allowed in respect of the second claim and that the judgment on that claim should be set aside and the record returned for hearing to determine the issues involved and for a fresh judgment thereupon.

Assuming that the presiding Acting Additional Native Commissioner was wrong in holding that the maxim *ex turpi causa non oritur actio* applied in this case, the effect of the *in pari delicto* rule, on which the defendant relied in the Court *a quo,* has to be determined in so far as the first claim is concerned.

As laid down in Jajbhay *v.* Cassim, 1939, A.D. 537, the principle underlying the *in pari delicto* rule is that the Courts will discourage illegal transactions, but the exceptions show that where it is necessary to prevent injustice or to promote public policy, the Courts will not rigidly enforce that rule. No good reason has been advanced, and none suggests itself why the claim in question should fall within the exceptions contemplated by the Roman-Dutch Law. On the contrary, public policy would best be served by not granting relief in respect of this claim. That this is the position is clear from what follows.

The relevant circumstances in the present instance are entirely different from those in the case of Brandt *v.* Bergstedt, 1917, C.P.D. 344, which the Appellate Division of the Supreme Court in Jajbhay's case (supra) held, had been wrongly decided, and in which relief ought to have been granted to the plaintiff. In Brandt's case the plaintiff sold a cow to the defendant on a Sunday in contravention of the provisions of Ordinance No. 1 of 1838 and subsequently sued the defendant for the restoration of the cow or payment of its value, *the defendant having failed to pay the purchase price therefor.* In that case justice demanded that the plaintiff should be granted relief as the defendant had taken advantage of the illegal transaction to enrich himself unduly by denying the plaintiff the purchase price of the cow and yet retaining that animal which had been delivered to him in pursuance of the sale.

In the claim under consideration, however, the plaintiff made certain payments to the defendant for the purposes of his (plaintiff's) entering into an illicit union with the defendant's daughter. Although the plaintiff stated in his claim that these payments were made as lobolo, it was not possible in law for him to have done so seeing that, as was admitted by him in the pleadings, he was at that time married to another woman according to civil rites and he could therefore not enter into a lawful customary union with defendant's daughter. It follows that the plaintiff made the payments in question to the defendant not as lobolo, in the accepted sense of that word, for the latter's daughter, but to procure her as a concubine. The question of these payments forming a depositum or " sisa ", as in the case of lobolo transactions where the customary union fails, therefore does not arise, and they must be taken as payments for an immoral purpose. Justice in this instance does not demand that the payments should be returned to the payer, since this is not a case in which the defendant took advantage of the illegal transaction to enrich himself unduly as the defendant did in Brandt's case; in other words there are no equities in the plaintiff's favour, *vide* Kelly *v.* Wright, 1948. (3) S.A. 522 (A.D.); and the granting by the Court of relief by way of repayment in the present instance cannot be justified on the ground that it is necessary to satisfy the requirements of public policy, for to hold otherwise would nullify the very principle underlying the *in pari delicto* rule as set out above.

This view is in accordance with the decisions of this Court, *vide* Mncube *v.* Mazibuko, 1941, N.A.C. (N. & T.) 14, and Cele *v.* Soni, 1942, N.A.C. (N. & T.) 78. It is immaterial whether the plaintiff made the payments in question as lobolo or as isibizo or a fine, *vide* Cele's case (supra).

It follows that all the grounds of appeal fail in so far as the first claim is concerned.

As regards the second claim, the appeal succeeds for the reasons given by the learned President in his judgment.

For Appellant: Mr. T. J. D'Alton, of Durban.

For Respondent: Mr. P. A. Stocken, of Messrs. Stocken & McClean, Durban.

Cases referred to:—

Brandt *v.* Bergstedt, 1917, C.P.D. 344.
Jajbhay *v.* Cassim, 1939, A.D. 537.
Mncube *v.* Mazibuko, 1941, N.A.C. (T. & N.) 14.
Cele *v.* Soni, 1942, N.A.C. (T. & N.) 78.
Kelly *v.* Wright, 1948 (3) S.A. 522 (A.D.).

CASE No. 59 OF 1951.

MTUKUZI MTSHALI (Appellant) *v.* NKAMBANE MDIMA (Respondent).

N.A.C. CASE No. 94/51.

DURBAN: 31st October, 1951. Before Steenkamp, President, and Messrs. Balk and Lawrence, Members of the Court (North-eastern Division).

Practice and Procedure—Application de novo *for condonation of late noting of appeal against Chief's judgment—Considerations.*

Contract for purchase of child—Illegal contract—Application of "In pari delicto" *rule.*

Held: That the prior setting aside by this Court of the proceedings in the Native Commissioner's Court in the present instance, did not debar the applicant from subsequently pursuing his application for condonation of the late noting of an appeal against the Chief's judgment as it was never the intention of this Court that the Native Commissioner was thereby to be debarred from hearing and determining the application for condonation.

Held further: That as there is ample evidence on record that applicant has a good defence as regards the claim for the eight head of cattle concerned, the condonation applied for had been properly granted by the Native Commissioner.

Held further: That the "purchase" by the plaintiff of the child formed an illegal agreement to which the *in pari delicto* rule applies and that plaintiff could therefor not recover the cattle paid in pursuance of such agreement.

Appeal from the Court of the Native Commissioner, Ndwedwe.

Steenkamp (President), delivering the judgment of the Court:—

On the 11th July, 1950, the Chief heard the case instituted before his Court by the plaintiff, suing the defendant for eight head of cattle and £13 cash, being refund of lobolo he had paid for defendant's late sister. The Chief gave judgment in favour of plaintiff for the said eight head of cattle and £13. On the 17th August, 1950, defendant lodged an appeal with the Native Commissioner. The Native Commissioner heard the case on the merits, allowed the appeal and altered the Chief's judgment to read: "For plaintiff for the return of £13 and costs." An appeal was then noted to this Court and was heard on the 24th April, 1951, when the proceedings in the Native Commissioner's Court were set aside with costs on the grounds that the appeal from the Chief's Court was noted late and no decision had been given on the application for extension of time in which to note the appeal to the Native Commissioner's Court. There-

after application was made to the Native Commissioner for condonation of the late noting of the appeal from the Chief's Court.

An affidavit was filed by the plaintiff, now appellant, and on the day the application was set down for hearing, the plaintiff adduced *viva voce* evidence and such evidence was also adduced by the defendant. Thereafter the Native Commissioner granted the application and condoned the late noting.

Counsel for appellant consented to the putting in of the original record, whereupon counsel for respondent agreed to the defendant being recalled for cross-examination. It therefore follows that the evidence already adduced before the Native Commissioner before the first appeal was noted, was to be evidence in the trial before him. He entered a judgment similar to the one he gave in the first instance and which had been set aside by the Native Appeal Court.

An appeal has now been noted to this Court, and this can be divided into two parts: Firstly, an appeal is noted against the Native Commissioner's finding in granting condonation; and secondly, an appeal is noted against the judgment, plaintiff averring in his notice of appeal that judgment should have been, in addition to the £13, for the eight head of cattle claimed by him. The ground of appeal is that the judgment is against the weight of evidence.

In so far as the grounds of appeal against the condonation are concerned, counsel for appellant has given three grounds and these are appended hereunder:—

(1) The appellant appealed previously and on the 24th April, 1951, the learned Judge set aside the proceedings in the Native Commissioner's Court with costs. The learned Judge said:—

> "... and again there is no mention of the application for condonation having been considered. In these circumstances the matter was not properly before the Native Commissioner and the omission cannot be remedied at this stage."

By virtue of this judgment the appellant says that the matter is not again cognisable by the Native Commissioner and that the learned Native Commissioner was out of order in hearing the matter again.

(2) In any event, if the learned Native Commissioner was entitled to hear the application for condonation (which appellant denies), then appellant says that the learned Native Commissioner was bound by the record and should NOT have heard new evidence or have permitted an affidavit signed after the hearing of the appeal to be used. There was no evidence on the record to justify the granting of the application for condonation and the application should have been refused.

(3) In any event if the Native Commissioner was entitled to hear the application for condonation on the evidence adduced at the hearing on the 4th June, 1951 (which appellant denies) then the onus was on Mdima who was making the application to satisfy the Court as to the grounds for such application and in this respect he produced only his own unsupported testimony which was denied by the appellant and the application for condonation and leave to appeal late ought not to have been granted.

I cannot agree that the setting aside of the proceedings in the Native Appeal Court deprives the Appellant from pursuing his application for the condonation of the late noting of an appeal from the Chief's Court. Such an application was proper and it was never the intention of the Native Appeal Court that the Native Commissioner was to be debarred from hearing and determining the application for condonation.

As far as the merits of the application are concerned I find from the affidavits and the evidence that the plaintiff (i.e. the applicant) became ill after the judgment had been given by the Chief. In fact, he states that both he and his brother got ill and he first of all had to nurse his brother, who subsequently died, and that at the time there was a general epidemic of influenza at the kraal.

This Court has previously laid down that when an applicant depends on illness, he should bring corroborative evidence, i.e. in the form of a medical certificate or other corroboration. In the present case the contents of the plaintiff's affidavit are such that they ring true.

Defendant gave *viva voce* evidence as mentioned before and he states that he knows that the applicant's brother had died, but he denies that applicant was ill, as he had seen him at his kraal during July, 1950, and he was then in good health.

The Native Commissioner has, however, seen fit to condone the late noting and apart from this question, there is ample evidence on record that the applicant had a good defence on the claim for the eight head of cattle, and for this reason alone, I am of opinion that condonation should have been granted and I agree that the Native Commissioner acted correctly in doing so.

Dealing with the merits of the case, it would appear that the late Somdoda, a nephew of the plaintiff, now appellant, became engaged to a girl by the name of Gijiji, a sister of the defendant, but at that time defendant's father, Mzanywa, was still alive and the money and any cattle that were paid, were handed over to Mzanywa, and the defendant is now being sued in his capacity as general heir of his late father.

Somdoda and the girl Gijiji are both dead, and they died before any marriage could take place.

The amount of £13 is not disputed, but there is a dispute as to the number of cattle that were paid. While the late Somdoda was engaged to Gijiji, he rendered her pregnant on three occasions, for which there was payable one ngqutu beast and three mvimba cattle.

The defendant in his plea admits that six head of cattle and £13 were paid and he states that the two extra head of cattle which the plaintiff claims, are the progeny of cattle that were paid as mvimba.

This Court need only concern itself with the two head of cattle paid over and above the four head that were due as damages for having rendered the girl pregnant, as I am satisfied that the other cattle are the progeny of the said ngqutu and mvimba cattle and were born after they had been paid as such, as found by the Native Commissioner.

The Native Commissioner has found proved that two extra cattle were paid because the plaintiff was buying the one child who was alive at the time its natural father and mother died, and the Native Commissioner goes on and states: "the probabilities all point to an agreement being made by plaintiff to buy this boy from the late Mzanywa, which is an illegal contract". He has applied the *in pari delicto* rule and holds the view that the plaintiff cannot recover those two head of cattle or their progeny. The finding of the Native Commissioner that this boy was "bought" is borne out by the evidence and all this Court has to decide is whether the plaintiff may in law recover the two head of cattle he had paid to retain this boy.

This boy lived at the plaintiff's kraal and died there, which indicates that the alleged purchase and sale must have taken place, and there can be no doubt that this is an illegal contract

Children cannot be treated as chattels. This is contrary to public policy and immoral; and if anyone makes himself a party to such a transaction, he only has himself to blame, should he afterwards find himself in the position in which the plaintiff finds himself in the present case.

It is my view that, taking all the factors into consideration, the plaintiff cannot recover anything more than the £13 isibizo fees which he paid in addition to the ngqutu beast; the three mvimba cattle and the two cattle which represented the purchase price of the illegitimate child.

The appeal should be dismissed with costs.

Balk (Permanent Member): I concur.

Lawrence (Member): I concur.

For Appellant: Mr. Mathias, of Messrs. Cowley & Cowley, of Durban.

For Respondent: Mr. R. I. Arenstein, of Durban.

CASE No. 60 OF 1951.

TRYPHINA LEDWABA (Appellant) v. GIDEON LEDWABA (Respondent).

N.A.C. CASE No. 95/51.

PRETORIA: 3rd December, 1951. Before Steenkamp, President; and Messrs. Balk and O'Connell, Members of the Court (North-eastern Division).

Practice and Procedure—Locus standi *of woman whose marriage has been dissolved by Native Divorce Court—Joinder of co-plaintiff—Best evidence rule.*

Children—Custody of minor children of the marriage after a decree of divorce has been granted by the Native Divorce Court in a case in which the marriage had been preceded by a customary union between same parties.

Native Law and Custom—Person liable to restore the lobolo after decree of divorce has been granted by Native Divorce Court.

Held: That a woman whose marriage had been dissolved by the Native Divorce Court, has *locus standi* to bring a claim under Common Law without being assisted therein.

Held further: That in the circumstances of the instant case, it was not competent for the Court *a quo* to have joined a second plaintiff.

Held further: That in fact there had been no such joinder.

Held further: That the children of the customary union between the parties became solely children of their subsequent marriage in so far as concerns the parties' rights to the custody of such children.

Held further: That assuming, without deciding, that a Native Commissioner's Court has concurrent jurisdiction with the Native Divorce Court in the matter of the custody of the minor children of the marriage after a decree of divorce had been granted by the last-mentioned Court, the Court *a quo* should not have dealt with the matter of the award of the custody of the minor children of the marriage as a case of first instance and not as a variation of an existing order as

was done, without first satisfying itself by reference to the relative order of the Native Divorce Court whether or not the matter was *res judicata.*

Held further: That it is a fundamental principle of law that the best evidence must be adduced and where the best evidence is the handing in of the order made by the Native Divorce Court, this should have been done, and the Court *a quo* should not have relied on the mere oral statement of the plaintiff as to what that order was.

Held further: That as it was manifest from the evidence that the lobolo for plaintiff (defendant in reconvention) was actually paid by the defendant (plaintiff in reconvention) to the former's guardian under Native Law, and as in Native Law, the lobolo is, after dissolution of the marriage, refundable, not by the ex-wife, but by her guardian, it was not competent for the Court *a quo* to have awarded the defendant (plaintiff in reconvention) the return of the lobolo cattle.

Addendum: Presiding officers would be well advised that when one party is not legally represented and the other party is, to render the unrepresented party all the assistance to enable him/her to place the full facts before the Court and also to advise such party that the best evidence must be adduced.

Appeal from the Court of the Native Commissioner, Potgietersrust.

Balk (Permanent Member), delivering the judgment of Court:—

Tryphina Ledwaba (hereinafter referred to as "the plaintiff") instituted an action in the Native Commissioner's Court at Potgietersrust, claiming from her ex-husband, the defendant, the transfer of Stand No. 28, situate in the Potgietersrust Municipal Location or refund of its value £200 and the return of certain pots and a basket or their value £5. 2s. She averred in her summons that these pots and the basket had been purchased by her during the subsistence of her civil marriage to the defendant and further that—

"(*a*) defendant married plaintiff by Native Custom in or about 1939, and by civil rites without community of property in 1944;

(*b*) defendant without plaintiff's knowledge or consent transferred ownership of the said Stand No. 28, valued at £200, to defendant's name;

(*c*) this marriage was dissolved by the Native Divorce Court in August, 1950."

There is no necessity to deal with the defendant's plea, except for his admission therein of the facts set out in sub-paragraphs (*a*) and (*c*) above, as the appeal by the plaintiff is confined to the judgment on the counterclaim preferred by the defendant, in which he sought the dissolution of the customary union entered into between him and the plaintiff on the ground of malicious desertion, the custody of the four children of that union and the restoration of the lobolo *paid to the plaintiff* by the defendant in respect of that union.

The plaintiff was not represented by a legal practitioner in the Court *a quo* and the attorney for the defendant *in limine* took the point in that Court "that plaintiff has no *locus standi* to act as plaintiff unassisted by her guardian in the action while it is not clear from the summons whether the case is to be decided according to Common Law or Native Law and Custom".

The presiding Assistant Native Commissioner in the Court *a quo* ruled that the plaintiff had no *locus standi* to sue and postponed the hearing of the case to enable her to amend her summons.

At the resumed hearing of this case in the Court below the presiding judicial officer made the following notes in the record of the proceedings:—

> "The same parties as before and Oriah Rankapole guardian to Tryphina Ledwaba quoted as Plaintiff No. 2.
> Plea is read.
>
> Plea by Plaintiff No. 2 to counterclaim: 'I cannot plead to the counterclaim as I had no knowledge of it. I wish the case to be postponed. I have no objection to the issue on claim by Plaintiff No. 1 be decided.'"

From those notes it would appear that, although Oriah had no objection to the case between the plaintiff and the defendant proceeding and was apparently also agreeable to assisting the plaintiff as far as necessary in this action, it is doubtful whether he consented to being joined therein as co-plaintiff. There is no mention in the record of proceedings in this case of an application to have Oriah joined as co-plaintiff having been made or considered. According to that record the only point raised in so far as concerns Oriah was his assisting the plaintiff to bring her action. If it was the intention of the presiding Assistant Native Commissioner *ex mero motu* to join Oriah as co-plaintiff, it is not understood why he did so since the counterclaim is directed solely against the plaintiff. In any event, such joinder was not competent, see Makgothi *v.* Worringham & Layton, N.O., 1928, O.P.D. 76. Although the Assistant Native Commissioner concerned styled Oriah as Plaintiff No. 2 and required him to plead to the counterclaim, it seems clear from the headings of the process in this action and particularly from the Assistant Native Commissioner's certificate of record therein that in fact Oriah was not a party but appeared solely for the purpose of assisting the plaintiff in bringing her action. The appeal will therefore be dealt with on that basis. It is rather disquieting to find that an Assistant Native Commissioner should create so much confusion in so simple a matter. It must be added that for the purpose of bringing her action, the plaintiff, in my view, need not have been assisted therein, as it is obvious that the Common Law applies to her claims, see Molefe *v.* Molefe, 1946, A.D. 315, and as the system of law applied dictates the capacity of the party concerned as laid down in *Ex Parte* Minister of Native Affairs in *re* Yako *v.* Beyi, 1948 (1), S.A. 388 (A.D.).

The following judgment was entered in the Court *a quo* on the counterclaim:—

> "Plaintiff in reconvention awarded the custody of the four children born from the customary union and refund of lobola namely 5 cattle, 5 goats or their cash value £20 within three months from date with costs."

The appeal brought by the plaintiff in convention is, as mentioned above, only against the judgment on the counterclaim and is based on the following grounds:—

"1. (*a*) The summons as issued was clearly a dispute arising out of the estate of the litigants who had been married by civil rites and which marriage was dissolved by an Order of the Native Divorce Court.

(*b*) The decree of divorce vested the parties with *locus standi vis-a-vis* each in regard to matters arising out of the civil marriage and the dissolution of the marriage tie with its concomitant rights and obligations.

(*c*) Plaintiff was unrepresented at the trial and *ex facie* the record led to believe that the summons was bad in law and it was necessary for her to join her guardian as co-plaintiff.

(*d*) The joining of a second plaintiff was irregular and prejudicial to appellant.

(*e*) The joining of a second plaintiff extended to appellant issues centering on Native Law and Custom to which she could not be a party.

(*f*) By reason of the joining of the second plaintiff matters arising out of Native Law and Custom were permitted which involved the plaintiff as a litigant in matters where it was not competent for her to appear or be brought to Court.

2. (*a*) The parties having been married by civil law a decree of divorce with its concomitant order in regard to the custody of the children was a matter of vital importance to appellant. The substitution of Native Law and Custom as the basis for the cause of an action was not competent by reason of the civil marriage and disclosed no cause of action.

(*b*) No plea to the counterclaim was competent from the appellant and in fact the plea was only taken after the evidence for the plaintiff had already been led.

3. It was not competent for the Court to vary the order for custody of children as granted in the Native Divorce Court without having regard to the basis of the order made in the Native Divorce Court.

4. Plaintiff was unrepresented and details of the decree of divorce with associated order in regard to the custody of the children was not canvassed in the pleadings or evidence.

5. The finding that appellant was not an innocent party in the divorce proceedings and, therefore, not entitled to the custody of the children is not based on evidence (it may well have been that appellant did not resist a Final Order of Divorce by reason of agreement reached between the parties in regard to the custody of the children if in fact a final decree of divorce was granted)."

The matter of the apparent misjoinder has been dealt with above. The next question to be considered is the award in the judgment under appeal of the custody of the four minor children (hereinafter referred to as "the children") to the defendant (plaintiff in reconvention).

It is manifest from the pleadings and the evidence of the defendant—the plaintiff did not give evidence as to when the children were born—that the children were born to the plaintiff and defendant during the subsistence of the customary union between them and that, after the birth of the children, the plaintiff and defendant entered into a civil marriage which was dissolved by the Native Divorce Court in August, 1950. This leads to a consideration of two important questions, viz., (*a*) whether the children remained solely children of the customary union or became solely children of the subsequent marriage in so far as concerns their parents' rights to their custody; and (*b*) if the children became solely children of the marriage whether it was competent for the Assistant Native Commissioner to decide the matter of the right to the custody of the children as between the plaintiff and the defendant after the dissolution of their marriage by the Native Divorce Court in August, 1950, with, according to the uncontroverted evidence of the plaintiff, an order awarding her the custody of the children.

Under Common Law children born to natural parents—and here, according to the record, we are not dealing with adulterine or incestuous children—become children of a subsequent marriage entered into by such parents. Although customary unions have been accorded recognition by special legislation, i.e. the Native Administration Act, 1927, they still find no place under the Common Law; in other words a customary union remains a Native Law institution; and whilst such a union is legal, it and

the Common Law institution of marriage are mutually exclusive in the sense that a marriage entered into by the parties to a customary union supersedes, and to all intents and purposes, has the effect of extinguishing that union. That this is the position appears to me to gain support from the reasoning in the judgment in Mkambula *v.* Linda, 1951 (1), S.A. 377 (A.D.), particularly as the rights of the partners of a customary union entering into a subsequent marriage are superseded thereby, e.g., the male partner cannot lawfuly take a second wife during the subsistence of the marriage which he could lawfully have done if the customary union had not been followed by the marriage; so that to my mind it is clear that the rights of the parties arising out of their unions are dictated not by the customary union but by the subsequent marriage, unless of course otherwise provided by law. The only such other provisions of law in so far as are relevant to the instant case, appear to be contained in section *twenty-two* of the Native Administration Act, 1927. The effect of these provisions is discussed in the judgment in Nkambula's case (supra) and the conclusion there arrived at is that "the 'material rights' of the woman and the issue of the customary union are preserved and safeguarded but in other respects the Act (Native Administration Act, 1927), does not contemplate the existence side by side of a civil marriage and a customary union". It is true that in that case the rights of the female partner of a customary union who was not the woman subsequently married by the male partner, are in issue but it seems to me that the principles enunciated in that case apply with equal force in the present action. The provisions of section *twenty-two* (7) of the Native Administration Act, 1927, do not of course apply in any event in the instant case as the marriage was contracted by the partners to the customary union and not by the one partner thereof with a person other than the other partner. See also Raphuti & Raphuti *v.* Mametsi, 1946, N.A.C. (T. & N.), 19, Matchika *v.* Mnguni, 1946, N.A.C. (T. & N.), 78, and Tobiea *v.* Mohatla, 1, N.A.C. (S.), 91. I therefore come to the conclusion that in this case the children became solely children of the marriage in so far as concerns their parents' rights to their custody. That this is the correct legal position appears to have been accepted by the legislature when it enacted section *twenty-seven* of the Native Laws Amendment Act, 1949, in as much as in so doing it empowered the Native Divorce Courts, which are Courts solely of *Common Law matrimonial causes,* to determine questions arising out of Native marriages, which obviously include the question of the custody of children of the marriage, and it did not confine the Native Divorce Courts' jurisdiction to questions arising out of Native marriages in which there had been no prior customary union between the parties or in respect of which no lobolo was paid.

Turning to the next question posed above, i.e. question (*b*), the position until section *ten* of the Native Administration Act, 1927, Amendment Act, 1929, was amended by section *twenty-seven* of the Native Laws Amendment Act, 1949, was that the Native Divorce Court concerned had no jurisdiction in the matter of the custody of minor children of the marriage on such marriage being dissolved by that Court, and that the proper Court to deal with the question of the custody of such children following on a decree of divorce by the Native Divorce Court was a Native Commissioner's Court, see Dhlamini *v.* Dhlamini, 1947, N.A.C. (T. & N.), 22, and the previous decisions referred to therein. The said amendment conferred the jurisdiction in question on the Native Divorce Court. Assuming, without deciding, that this amendment did not oust the jurisdiction of a Native Commissioner's Court in this respect but left it with concurrent jurisdiction therein, it is still necessary in the instant case to determine whether or not it was competent for the Court *a quo* to have awarded the custody of the children to the defendant (plaintiff in reconvention) seeing that, according to the evidence of the

plaintiff, which was not controverted, she had already been awarded the custody of the children by the Native Divorce Court on its granting a decree of divorce in August, 1950, in respect of their marriage. This aspect was not properly canvassed in the Court *a quo,* and it seems to me that the award in question should not have been made by that Court as a matter of first instance and not as a variation of an existing order, as was done, without its first satisfying itself by reference to the relative judgment of the Native Divorce Court whether or not this matter was *res judicata.*

Coming to the question of the restoration of the lobolo cattle, it is averred in the counterclaim that this lobolo was paid to the plaintiff but it is manifest from the evidence that it was actually paid to Oriah. That being so and as in Native Law the lobolo is, in this case, refundable not by the plaintiff (defendant in reconvention) but by her guardian, Oriah, it was not competent for the Court *a quo* to have awarded the defendant (plaintiff in reconvention) the return of the lobolo cattle.

In the result the appeal should, in my opinion, be allowed with costs and the Native Commissioner's judgment on the counterclaim should be altered to read:—

"Counterclaim dismissed with costs."

Steenkamp (President):—

I agree with my brother Balk that the appeal on the counterclaim must succeed, but I wish to state that I am not satisfied at all that plaintiff has been given a full opportunity and advice to canvass her case properly in the Court below. She gave no evidence on the counterclaim in which she was defendant in reconvention. She was not legally represented in the Court below and I feel that until such time as her evidence has been canvassed, no judgment should be granted against her. Oriah should never have been cited as a party in the case. At the very commencement he objected to being cited and he informed the Court that he was only there to assist plaintiff, which he was prepared to do. It is noted that he was only brought into the case after the Assistant Native Commissioner had ruled—which ruling, in my opinion, was wrong—that she should be assisted.

It is difficult to understand why the order made by the Native Divorce Court concerning the custody of the children was not put in as evidence. It is a fundamental principle of law that the best evidence must be adduced and where the best evidence is the handing in of the order made by the Divorce Court, this should have been done and the Court should not have relied on the mere oral statement by plaintiff as to what the order was. We are dealing with a Native woman and her evidence as to what the order was is only secondary evidence.

Presiding officers would be well advised that when one party is not legally represented and the other party is, to render the unrepresented party all the assistance to enable him/her to place the full facts before the Court and also to advise such party that the best evidence must be adduced.

O'Connell (Member):—

I agree that the appeal should be allowed with costs and the Native Commissioner's judgment on the counterclaim be altered to read: "Counterclaim dismissed with costs".

For Appellant: Adv. D. D. Isaacs, instructed by Messrs. Helman & Michel, Johannesburg.

For Respondent: Adv. P. J. Rabie, instructed by Messrs. Roux & Jacobsz, Pretoria.

Cases referred to:—

Makgothi *v.* Worringham & Layton, N.O., 1928, O.P.D., 76.
Molefe *v.* Molefe, 1946, A.D., 315.

Ex Parte Minister of Native Affairs in *re* Yako *v.* Beyi, 1948 (1), S.A., 388 (A.D.).
Nkambula *v.* Linda, 1951 (1), S.A., 377 (A.D.).
Raphuti & Raphuti *v.* Mametsi, 1946, N.A.C. (T. & N.), 19.
Matehika *v.* Mnguni, 1946, N.A.C. (T. & N.), 78.
Dhlamini *v.* Dhlamini, 1947, N.A.C. (T. & N.), 22.
Tobiea *v.* Mohatla, 1, N.A.C. (S.), 91.

Statutes referred to:—

Section *twenty-two* of Act No. 38 of 1927.
Section *ten* of Act No. 9 of 1929.
Section *twenty-seven* of Act No. 56 of 1949.

CASE No. 61 OF 1951.

WILLIAM MATLALA (Appellant) *v.* **EPHRAIM TOMPA (Respondent).**

N.A.C. CASE No. 116/51.

PRETORIA: 3rd December, 1951. Before Steenkamp, President; and Messrs. Balk and O'Connell, Members of the Court (North-eastern Division).

Native Law and Custom—In Native Law repudiation by the wife does not dissolve the customary union without restoration of lobolo cattle.

Practice and Procedure—Form in which actions should be brought under Native Law in the Transvaal, in which the wife has repudiated her husband and the lobolo paid for her has not been restored—Summons disclosing no cause of action—Particulars required to give effect to provisions of section eleven (2) *of the Native Administration Act,* 1927, *as amended.*

Held: That in Native Law the repudiation by the wife does not dissolve the customary union without the restoration of lobolo cattle.

Held further: That it is an open question whether the restoration of only part of the total number of lobolo cattle returnable by the father of the wife to her husband to terminate the customary union between them, has the effect of dissolving it.

Held further: That the proper procedure in the Transvaal in actions of the nature in question, in which the customary union has not already been dissolved by the restoration of the lobola cattle returnable, is to claim the return of the wife, failing which, the restoration of the lobolo.

Held further: That in the instant case the summons disclosed no cause of action.

Addendum: It is essential that the pleadings should disclose the tribes to which the parties belong, and should they not belong to the same tribe, such other particulars as are required by the Court to give effect to the provisions of sub-section (2) of section *eleven* of the Native Administration Act, 1927, as amended, must be disclosed therein, and if not settled by the pleadings, the position in this respect should be determined by evidence.

Appeal from the Court of the Native Commissioner, Hammanskraal.

Balk (Permanent Member), delivering the judgment of the Court:—

The plaintiff (present appellant) sued the defendant (present respondent) in the Native Commissioner's Court at Hammanskraal, claiming in his summons, as amended:—

"1. Payment of £4 and delivery of 5 head of cattle and their progeny paid to defendant as and for lobola for the defendant's daughter Ellen Tompa on account whereof

1 beast has already been returned to him. Defendant and his said daughter Ellen have publicly terminated the customary union between plaintiff and Ellen and the latter is now living as man and wife with certain Paul Komo at Mooiplaas, Pretoria, as she has been doing for the last three years.

2. Costs of suit.
3. Alternative relief."

The defendant pleaded:—

"Defendant states plaintiff has been in Cape Town for the last three years and his wife has been left here. Defendant denies that the customary union between his daughter and plaintiff has been dissolved.

Defendant admits that he has refunded to plaintiff one beast and £1 as ordered by the tribal lekgotla.

Defendant states that his daughter has been driven away by plaintiff and for that reason he is not entitled to a refund of lobola.

Defendant states that he wishes his daughter to return to the plaintiff and that his daughter is willing to return.

Defendant denies that his daughter has been living with a Native, Paul Kumo, for the last three years."

After the defendant's verbal plea had been recorded by the presiding judicial officer in the Court *a quo*, the latter advised the plaintiff's attorney that his summons had been wrongly drawn in the light of the judgment in Manana d.a. *v.* Masuku, 1947, N.A.C. (T. & N.), 116.

The attorney concerned thereupon applied to amend the summons and the hearing of the action was postponed to enable him "to submit an amended summons".

At the resumed hearing of the case, the plaintiff's attorney referred to *South African Native Law* by Whitfield at page 202 and contended that the customary union in question had already been dissolved and that the summons had been correctly drawn.

The attorney for the defendant submitted that "as the Court has already ruled that the summons is bad and plaintiff undertook to amend his summons, the matter is ended unless plaintiff issues an amended summons."

The presiding Native Commissioner thereupon dismissed the summons with costs on the ground that, as he had already ruled, it was defective.

The appeal against this judgment is based on the following grounds:—

"(*a*) The judicial officer erred in holding that a customary union cannot be dissolved by the parties thereto without a prior order of the Court that the guardian of the woman should first be ordered to return the woman to her husband.

(*b*) The judicial officer erred in holding that the return of portion of the dowry or lobola cattle by the defendant did not mark the dissolution of the customary union. This finding of the judicial officer is contrary to the *obiter dictum* in the case of Manana *v.* Masuka, N.A.C. (N. & T.), 1947, to the effect that a customary union is never dissolved until the dissolution is marked by the return of the dowry or lobola cattle.

(*c*) The plaintiff should have been allowed to establish the allegations in his summons which would have resulted in a *prima facie* case for judgment to be entered in plaintiff's favour."

It seems clear from the presiding Native Commissioner's reasons for judgment that he dismissed the summons in this action *not* on the grounds set out in the relative notice of appeal, but because he considered it to be fatally defective. This leads to a

consideration of the last-mentioned aspect. In this connection the judgment in Mashapo & Mashapo *v.* Sisane, 1945, N.A.C. (T. & N.), 57, in so far as it deals with this aspect, is in point. The dictum in that case, in so far as repudiation by the wife is concerned, was affirmed by this Court in Saulus *v.* Sebeko & Sebeko, 1947, N.A.C. (T. & N.), 25.

In the summons in the present action it is averred that one of the cattle paid as lobolo by the plaintiff to the defendant for the latter's daughter, Ellen, had been returned by the defendant to the plaintiff but the purpose of its return is not specified therein. As that beast may have been returned for some purpose other than to mark the dissolution of the customary union between the plaintiff and Ellen, and as it is manifest from the judgments in Mashapo's and Saulus' cases (supra) that the termination of the customary union in question by Ellen and the defendant, as alleged in the summons, could not in the circumstances of the present case, have had the effect of dissolving that union according to Native Law without the restoration of lobolo cattle, the summons is fatally defective in that it discloses no cause of action. It must be added that, even assuming that the one beast had been returned to mark the dissolution of the customary union, it is an open question whether the restoration of only part of the total number of lobolo cattle returnable by the father of the wife to her husband to terminate the customary union between them, has the effect of dissolving it, as the relevant passages in the judgments in Mashapo's and Saulus' cases (supra) may well mean that in Native Law all the lobolo returnable, i.e. the whole lobolo paid by or on behalf of the husband less any recognised deductions, such as for children of the customary union concerned, etc., must be restored to him by his wife's father before their customary union can be regarded as having been dissolved.

In actions of the nature in question in which the customary union has not already been dissolved by the restoration of the lobolo returnable, the proper procedure in the Transvaal is to claim the return of the wife, failing which the restoration of the lobolo; see the three cases quoted above and numerous other decisions of this Court to that effect.

I am of opinion that the present appeal should be dismissed with costs since the summons is fatally defective in that it discloses no cause of action as is evident from what has been stated above and as the plaintiff was afforded ample opportunity in the Court *a quo* to amend his summons.

It is observed that the tribes to which the parties belong and, should they not belong to the same tribe, such other particulars as are required by the Court to give effect to the provisions of sub-section (2) of section *eleven* of the Native Administration Act, 1927, as amended, have not been disclosed in the pleadings in the present action. It is essential that the pleadings should disclose the position in this respect in all actions in Native Commissioner's Courts, as frequently a proper decision between the parties rests thereon; and where the position in this respect is not settled by the pleadings, it should be determined by means of evidence, *vide* Duba *v.* Nkosi, 1, N.A.C. (N.E.), 7.

Steenkamp (President): I concur.

O'Connell (Member): I concur.

For Appellant: Mr. H. A. Jensen, of Pretoria.

For Respondent: Mr. N. Swirsky, of Johannesburg.

Cases referred to:—

Mashapo & Mashapo *v.* Sisane, 1945, N.A.C. (T. & N.), 57.
Saulus *v.* Sebeko & Sebeko, 1947, N.A.C. (T. & N.), 25.
Manana, d.a. *v.* Masuku, 1947, N.A.C. (T. & N.), 116.
Duba *v.* Nkosi, 1, N.A.C. (N.E.), 7.

Statutes referred to:—

Sub-section (2) of section *eleven* of Act No. 38 of 1927.